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SUPREME COURT, U.S.

NO. 81-6947

SUPREME COURT OF THE UNITED STATES OF AMERICA

1981~~1982~~ TERM

THE PEOPLE OF THE STATE OF COLORADO,

~~Plaintiff~~-Appellee,

vs.

RICHARD VELASQUEZ,

~~Defendant~~-Appellant.

APPEAL FROM THE SUPREME COURT OF COLORADO NO. 80SA517

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

NO.

SUPREME COURT OF COLORADO NO. 80SA517
COURT OF APPEALS OF COLORADO NO. 80CA0021
DISTRICT COURT, MONTROSE COUNTY, STATE OF COLORADO NO. 79CR11

JURISDICTIONAL STATEMENT

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

vs.

RICHARD VELASQUEZ,

Defendant-Appellant.

Richard Velasquez, Defendant-Appellant, will herein after be referred to as Appellant and The People of the State of Colorado, Plaintiff-Appellee, will herein after be referred to as Appellee. Appellant is making this Jurisdictional Statement according to Rule 15 as amended effective November 21, 1980 of the Supreme Court Rules of The Supreme Court of the United States of America.

QUESTIONS PRESENTED BY THE APPEAL

ARGUMENT I

Do the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article II §§3, 6, and 25 of the Colorado Constitution protect the Appellant against his counsel's failure to appeal points of error previously raised, his counsel's failure to properly raise all issues possible, and his counsel's failure to properly investigate all aspects of the case, failure to prepare a defense and failure to request a continuance of trial in order to have ample time in which to effectively represent the Appellant, despite the Appellant's objections throughout the proceedings that his counsel do all of the above, and thus allow the Appellant to raise all possible errors on his own since the "deliberate by-pass" of these errors was not the choice of the Appellant but of his attorney's against the wishes of the Appellant?

ARGUMENT II

Argument II presents several questions. They are as follows:

1. Does the Fourth and Fourteenth Amendments of the United States Constitution and Article II §§6, 7, and 25 of the Colorado Constitution protect the

Appellant from unreasonable searches and seizures, and require all searches and seizures to be supported by probable cause and meet all the warrant or warrantless search and seizure requirements, and protect the Appellant from the use of all evidence obtained from an unreasonable search and seizure from being used as evidence against him at trial?

2. Was the seizure and later search of Appellant's car incident to arrest and supported by probable cause?

(a). Does the arrest, search and seizure of Appellant inside the motel room provide justification to seize Appellant's car, which was parked outside, as incident to arrest?

(b). Does the arrest in the motel room and seizure of the evidence therein povide probable cause to seize and search Appellant's car and were there exigent circumstances requiring immediate seizure without a warrant?

(c). Was there any justification to seize or remove Appellant's car from the motel parking lot?

(d). Does the fact that the evidence searched for in the car was evidence of a different crime than what Appellant was arrested for and which could not properly be used to support the crime for which Appellant was arrested provide probable cause to seize and search Appellant's car without a warrant and as incident to arrest?

(e). Does the fact that Appellant had been arrested and handcuffed inside the motel room and taken from there to jail and incarcerated and his car had been towed, impounded and sealed by the police and later searched pursuant to a search warrant provide further proof that the seizure and search of the car was not incident to arrest and thus must depend entirely on the sufficiency of the affidavit and search warrant?

2a. Does the search warrant and affidavit provide probable cause to search and is it sufficient or is it fatally defective?

(a). Does the warrant and affidavit contain written affirmation, underlying facts or circumstances on which the affiant based his conclusions that a further quantity of dangerous drugs and/or traces of marijuana were located in Appellant's car or was this just a general exploratory search? Does the warrant and affidavit contain written affirmation, underlying facts or circumstances on which the informant or anyone else based his conclusions that a further quantity of dangerous drugs and/or traces of marijuana were located in Appellant's car?

(b). Was the search of the suitcases and othe containers in the car illegal because it was done without a warrant and without probable cause?

(c). Did the use of the word "may" rather than a more positive word such as "is" or "are" by the affiant in the phrase "a further quantity of dangerous drugs and/or traces of marijuana may be located in the above described car" make the search warrant and affidavit vague and fatally defective and prove that the search was exploratory and conducted without probable cause?

(d). Does the search warrant and affidavit fail to partivularly describe the place to be searched or the things to be searched for and seized by the use of the words and phrases "dangerous drugs", "marijuana" and "traces of marijuana" in the search warrant and affidavit and thus making these documents vague and fatally defective and provide further proof that the search was exploratory and conducted without probable cause?

(e). Was the warrant and affidavit fatally defective because the blank was not filled in which states who the affiant appeared before and who is authorized to issue warrants in criminal cases? Did it also fail to state where the car is located? Did it also fail to state which Judge of what court signed the warrant?

(f). Was the alleged search for traces of marijuana illegal as not being based on probable cause and because it was a search for something that is not a crime?

ARGUMENT III

1. Does the Sixth and Fourteenth Amendments of the United States Constitution and Article II ~~§§~~, 16 and 25 of the Colorado Constitution protect Appellant from ineffective assistance of counsel and guarantee that he be represented by effective assistance of counsel at all stages of the proceedings and did Appellant's counsel provide such assistance to him in this case?

This Argument also presents several other questions. They are as follows:

(a). Did Appellant's attorney's closing argument violate Appellant's right to effective assistance of counsel? Did Appellant's Attorney's stating that Appellant was guilty, of bad character, and other derogatory remarks, during this closing argument in effect enter a plea for Appellant, something that is only proper for Appellant to do?

(b). Was Appellant deprived of effective assistance of counsel by the court returning a sum of confiscated money and dismissing the public

defender and ruling that Appellant was no longer indigent and could now afford to hire his own attorney?

(c). Did Appellant's attorney have sufficient time to investigate all possible errors and to also properly prepare for trial and was it error for him not to request a continuance? Was it also error for Appellant's attorney not to perfect an appeal of all errors that he had previously raised?

(d). Does the record show that there were many other errors which could have been raised and would have by any competant and experienced attorney and which further demonstrate Appellant's attorney's incompetance in this matter?

(e).. Should the following errors have been raised and appealed by Appellant's attorney?

(1). Was it error for Appellant's attorney to fail to analyze and introduce the inaudible tape recording into evidence?

(2). Was it error for Appellant's attorney to fail to adequately argue and investigate the circumstances surrounding the identification of the substance charged in Count V? Was Appellant convicted of a higher class of crime than what was shown by the evidence?

(3). Was Appellant convicted on Counts I and II in violation of the Constitutional proscriptions against double jeopardy?

(4). Were the Jury instructions adequate and did they properly instruct the jury of all the elements of the crimes charged?

ARGUMENT IV

Does the Fourteenth Amendment of the United States Constitution and Article II §§6 and 25 of the Colorado Constitution protect Appellant from being sentenced under laws which have been amended and now afford lower penalties and thus provide that he be sentenced pursuant to any amendatory legislation which mitigates the penalty for crimes when the relief is sought before finality has attached to the judgment of conviction?

ARGUMENT V

This argument also presents several questions. They are as follows:

1. Was Appellant denied his Constitutional and Statutory right to a speedy trial and does the Sixth and Fourteenth Amendments of the United States Constitution and Article II §§6, 16, and 25 protect these rights?

(a). Is the requirement that a plea be entered before the speedy trial time period begins unconstitutional because it establishes a lower

standard than is required by the Federal Constitution rather than a higher standard? Does it also create a standard whereby the Courts can intentionally by-pass an individuals speedy trial rights and does it also violate an individuals equal protection rights?

(b). Was Appellant properly advised by the court and the public defendar of his speedy trial rights?

(c). Was Appellant's Statutory right to a speedy trial violated by the fact that the trial court granted a single continuance which exceeded six months?

(d). Was the fact that the public defender had a vacation planned justification to violate the speedy trial time period or should the public defender have been ordered to appear on the date available or new counsel should have been appointed?

(e). Is it required that Appellant demand a speedy trial before he is entitled to the benefits of a speedy trial?

(f). Did Appellant request any continuances of trial and were any in fact given?

(g). Do the Colorado statutes provide that the court enter a plea of not guilty should a defendant fail to plead and thus a plea is actually entered at arraignment whether a defendant pleads or not? Is it proper for the court to set a trial date before a plea is entered?

ARGUMENT VI

Does the Fourth and Fourteenth Amendments of the United States Constitution and Article II §§6, 7, and 25 of the Colorado Constitution protect Appellant frome warrantless investigations and arrests by officers not in their own jurisdiction?

(a). Does the Montrose City Police have jurisdiction to conduct investigations and effect arrests therefrom outside the city limits without a warrant?

(b). Did the Colorado Bureau of Investigations (CBI) conduct this investigation in conjunction with the Montrose Police Department or did they only participate in an advisory capacity only? Was their presence also the fruit of the illegal investigation conducted by the Montrose Police Department?

(c). Can a Montrose Police Officer be specially deputized as a county sheriff? Can an Officer be a City Police Officer and a Sheriff at the same time? Do the Colorado Statutes or the Montrose City Ordinances provide for

such a procedure?

ARGUMENT VII

Does the Fourth and Fourteenth Amendments of the United States Constitution and Article II §§6, 7, and 25 of the Colorado Constitution protect Appellant from warrantless participant electronic monitoring and recording, by the state, of conversations betweent him and a police informant where the informant consented to the monitoring and recording?

(a). Is a warrant required before a listening device can be placed inside a room and prior to authorizing police agents to listen and record the conversation from outside?

(b). Was the monitoring and recording illegal and unreasonable because the bug was placed in a location, in the room behind the headboard of the bed, rather than on the person of the informant?

((c). Was it error to allow the agents listening to the conversation from outside the motel to testify and not introduce the tape recording itself?

ARGUMENT VIII

Did the court make a proper ruling concerning all issues as to their violation of both Federal and State Constitutions?

ARGUMENT IX

Did the court err in not granting Appellant a Rehearing due to the fact that Appellant was not notified when the hearing was to be and thus was not given the opportunity to present a supplemental or reply brief prior to the hearing and thus was deprived of a hearing pertaining to all the additional research that he had done between the time that he filed his Opining Brief and the time of the hearing? Did the court also misinterpret some of the issues and also rule contrary to some of the arguments than what was presented in the briefs and record?

ARGUMENT X

Did the Court err in not granting Appellant a limited remand to the trial court in order to present many of the new issues that Appellant had discovered in his research and that had not been raised below and that all state remedies had not been exhausted on?

PARTIES TO THE PROCEEDING

Hon. Jerry D. Lincoln, Judge, Montrose District Court, Montrose County, State of Colorado; Montrose District Court, Montrose County, State of Colorado;

William Morris, Assistant Attorney General, State of Colorado; Supreme Court of the State of Colorado; Supreme Court of the United States of America; Richard Velasquez, Pro Se, Montrose, Colorado, Defendant-Appellant.

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REFERENCES OF THE REPORTS

(d). The references of the reports of this case appear as follows: People v. Velasquez, No. 80SA517, February 16, 1982, The Colorado Lawyer, Vol. 11 No. 4, April 1982 p. 1081; People v. Velasquez, Colo., 641 P.2d 943 (1982).

NATURE OF PROCEEDINGS

(e). References to folio notes in the transcript will be in parenthesis (fn.).

This is an appeal from a jury's verdict of guilty and judgment and sentence entered thereon for four counts of a six count Information. Appellant was arrested on December 22, 1978 and incarcerated. A complaint was then filed against Appellant on January 3, 1979, (fn. 1-5). After a preliminary hearing the matter was bound over to the district court. The Information was supplemented by the addition of additional counts on February 8, 1979, (fn. 6-10). The counts charged were: Count I: dispensing dangerous drugs (F) in violation of 12-22-404 (1) (a), C.R.S. 1973, as amended in 1978,(fn. 394); Count II: Possession more than one ounce cannabis (M) in violation of 12-22-404 (1) (L), C.R.S. 1973, as amended 1978, (fn. 297); Count III: Possession of an illegal weapon in violation of 18-12-102, C.R.S. 1973, as amended 1978, (fn. 401); Count VI: Carry concealed firearm (M-2) in violation of 18-12-105 (1) (b), C.R.S. 1973, as amended 1978, (fn. 403); Count V: Possession of a narcotic Drug (F) in violation of 12-22-302, C.R.S. 1973, as amended 1978, (fn. 405); Possession of a narcotic drug for sale (F) in violation of 12-22-322 (1) (a), as amended 1978, (fn. 411). Appellant initially appeared in the district court with a public defender on March 8, 1979 for arraignment. Trial was then set for September 17, 1979. The public defender was dismissed from Appellant's case several days after arranignment and he subsequently obtained private counsel who entered his appearance on July 23, 1979. A hearing was held on the motion to suppress on August 27, 1979 and trial commenced on September 17, 1979 after a pretrial motion to dismiss, (fn. 546-778, 802-833). At the close of the prosecution's case, ajudgment of acquittal was entered as to count six but denied as to the remaining counts of the Information, (fn. 1591-95). On September 18, 1979, Appellant was found guilty of counts I, II, IV, and V of the Information and not guilty of count III, (fn. 1657-62). All post-trial motions were denied, (fn. 108-113, 115-119, 195, 197). Appellant was then sentenced on October 10, 1979 to a minimum of six (6) years and maximum of ten (10) years at the Colorado State Penitentiary on Counts I and V and to one year (1) in Montrose County Jail on Counts II and IV. All sentences to run concurrently, (fn. 1785).

The appeal duly proceeded from there. Appellant and his attorney had several disagreements during the trial proceedings mentioned above but the biggest disagreement concerned his handling of the appeal. Appellant's attorney only appealed one point of error rather than several as had been discussed previously. An Opening Brief was filed on behalf of Defendant-Appellant on May 19, 1980 in the Colorado Court of Appeals containing only one point of error. Appellant filed several motions with the courts and wrote letters to the Judge concerning this but received no response. Appellant does not have copies of many of these motions and letters as he was unfamiliar with court procedures at that time and thus did not make copies but they should appear in the record someplace. Appellant did request discovery of the entire record at one time so that he would have a chance to review everything but this motion was denied, one of these motion was denied March 12, 1981. Appellant's case was transferred from the Court of Appeals of Colorado to the Colorado Supreme Court without his knowledge and was informed of this in a letter from his attorney dated December 27, 1980 stating that his hearing was scheduled for January 16, 1981 at 1:30 p.m. Thereafter the Supreme Court of Colorado granted Appellant leave to proceed Pro Se on January 15, 1981 and granted him sixty (60) days or until March 16, 1981 within which to file a handwritten brief in support of appeal points. Appellant was then granted leave to Proceed in Forma Pauperis on February 11, 1981. Appellant was then given an additional extension in which to file an Opening brief and finally filed one on May 12, 1981. The prosecution filed the Answer Brief on September 8, 1981.

Appellant was never informed of the date of the hearing. Appellant had much research which he wished to present to the Court prior to the hearing but was not able to since he was not given notice of when the hearing was to be. The hearing was held February 15, 1982 and announced February 16, 1982. Due to the fact that Appellant learned of the decision from the newspaper he sent a letter to the Court requesting a copy of the opinion and an extention of time in which to file for a Rehearing. The extention was granted until March 24, 1982. Appellant had filed a motion for rehearing with the court with the court within the original time period since he had not heard from the court as yet and thus the Motion For Rehearing was denied March 15, 1982. Appellant then filed a more conplete Motion For Rehearing after this because he thought he had been given an extension and this motion was Stricken. The mandate was then

issued March 19, 1982. Appellant has since sent a Notice of Appeal Dated June 7, 1982 pursuant to Rule 12 of the Supreme Court of the United States Rules. Appellant does not know what day it reached the court as he filed it rather late in the time period due to his confusion of the rules. The Notice of Appeal was mailed to the District Court, Montrose, Colorado; Supreme Court of Colorado; and the Supreme Court of the United States of America.

The statutory provision Appellant is relying to confer jurisdiction of the appeal on this Court is 28 USCA §1257 and the Supreme Court of the United States of America Rules 10-15 and 53-now 46. Appellant is relying on the rules Amended effective November 21, 1980 as they appear in the 1981 Supplement issued in August in Volume 17 of the Supreme Court Digest "Lawyers Edition". The institution where Appellant is incarcerated has not updated their library.

(f). The constitutional provisions, treaties, statutes, ordinances, and regulations that this case involves are:

CONSTITUTION OF THE UNITED STATES

ARTICLE IV

Searches and seizures regulated. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

Grand jury-indictment-jeopardy-process of law-taking property for public use. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

Rights of accused. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

ARTICLE XIV

1. Citizenship defined-privileges of citizens. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

COLORADO CONSTITUTION

ARTICLE II

Section 3. Inalienable rights. All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.

Section 6. Equality of justice. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

Section 7. Security of person and property-searches-seizures-warrants. The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

Section 16. Criminal prosecutions-rights of defendant. In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Section 18. Crimes-evidence against one's self-jeopardy. No person shall be compelled to testify against himself in a criminal case nor shall any person

be twice put in jeopardy for the same offense. If the jury disagree, or if the judgment be arrested after the verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.

Section 25. Due process of law. No person shall be deprived of life, liberty or property, without due process of law.

COLORADO REVISED STATUTES

1973, as amended, 1978

12-22-302. Unlawful to possess. It is unlawful for any person to manufacture, possess, have under his control, receive, sell, buy, conceal, prescribe, administer, dispense, or compound any narcotic drug except as authorized in this part 3, or to conspire to commit any of the acts prohibited.

12-22-322. Violations-penalties. (1) No person, with intent to induce or aid another to unlawfully use or possess narcotic drugs shall:

(a) Possess for sale a narcotic drug except in accordance with the provisions of this part 3;

(2) (b) Except as provided in subsections (6) and (7) of this section, whoever violates section 12-22-302 or 12-22-315 is guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than ten thousand dollars and by imprisonment in the state penitentiary for not less than two nor more than fifteen years for a first offense;

12-22-404. Unlawful acts. (1) Except as provided in section 12-22-405, the following acts are declared unlawful:

(a) To dispense any dangerous drug unless:

(1) The possession or use or attempt to obtain or procure the administration of cannabis, which shall be punished as provided in section 12-22-412 (12).

12-22-412. Violations-penalties. (1) Any person who manufactures or dispenses dangerous drugs in violation of section 12-22-404, except as provided in this section, is guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars and by imprisonment in the state penitentiary for not less than one year nor more than fourteen years.

12-22-412 (6). Any person who possesses or uses any dangerous drug in violation of section 12-22-404 (1) (d), upon a first conviction, is guilty of a misdemeanor, and the court may:

(a) Impose a fine on the defendant in an amount not to exceed five hundred dollars, or a sentence of imprisonment in the county jail for not more than one year, or both such fine and imprisonment;

12-22-412(4)(d). Any person who possesses more than one ounce of cannabis or any amount of cannabis concentrate, upon conviction thereof, shall be punished as provided in subsection (8), (10), or (11) of this section.

16-3-106. Peace officer may pursue offender. When any peace officer is in fresh pursuit of any alleged offender, having a warrant for his arrest or having knowledge that such warrant has been issued, or, in the absence of an arrest warrant, when the offense was committed in the officer's presence or the officer has reasonable grounds to believe that the alleged offender has committed a criminal offense, and the alleged offender crosses a boundary line marking the territorial limit of his authority, such peace officer may pursue him beyond such boundary line and make the arrest, issue a summons and complaint, or issue a notice of penalty assessment.

16-3-301. Search warrants-issuance-grounds. (1) A search warrant authorized by this section may be issued by any judge of a court of record.

(2) A search warrant may be issued under this section to search for and seize any property:

(a) Which is stolen or embezzled; or

(b) Which is designed or intended for use as a means of committing a criminal offense; or

(c) Which is or has been used as a means of committing a criminal offense; or

(d) The possession of which is illegal; or

(e) Which would be material evidence in a subsequent criminal prosecution in this state or in another state; or

(f) The seizure of which is expressly required, authorized, or permitted by any statute of this state; or

(g) Which is kept, stored, maintained, transported, sold, dispensed, or possessed in violation of a statute of this state, under circumstances involving a serious threat to public safety or order, or to public health.

16-3-303. Search warrants-application. (1) A search warrant shall issue only on affidavit sworn to or affirmed before the judge and relating facts sufficient to:

(a) Identify or describe, as nearly as may be, the premises, person, place, or thing to be searched;

(b) Identify or describe, as nearly as may be, the property to be searched

for, seized, or inspected;

(c) Establish the grounds for issuance of the warrant, or probable cause to believe that such grounds exist; and

(d) Establish probable cause to believe that the property to be searched for, seized, or inspected is located at, in, or upon the premises, person, place, or thing to be searched.

(2) The affidavit required by this section may include sworn testimony reduced to writing and signed under oath by the witness giving the testimony before issuance of the warrant. A copy of the affidavit and a copy of the transcript of testimony taken in support of the request for a search warrant shall be attached to the search warrant filed with the court.

(3) Procedures governing application for and issuance of search warrants consistent with this section may be established by rule of the supreme court.

16-11-101 and 18-1-409 both pertain to Alternatives in sentencing and Appellate review of sentence for a felony. These have been cited in Argument IV pertaining to Amendatory legislation. Their text is not necessary as no provision appears in the statutes stating that defendants are entitled to amendatory legislation mitigating penalties for crimes. This appears in the case law cited in the discussion of the statutes themselves.

16-15-102. Ex parte order for wiretapping and eavesdropping. A copy of the text is included in the appendix.

18-1-405. Speedy trial. (1) Except as otherwise provided in this section, if a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months from the date of the entry of a plea of not guilty, he shall be discharged from custody if he has not been admitted to bail, and, whether in custody or on bail, the pending charges shall be dismissed, and the defendant shall not again be indicted, informed against, or committed for the same offense, or for another offense based upon the same act or series of acts arising out of the same criminal episode.

(3) If a trial date has been fixed by the court, and thereafter the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional six months' period from the date upon which the continuance was granted.

16-7-208. Failure or refusal to plead. If a defendant refuses to plead, or if the court refuses to accept a plea of guilty or a plea of nolo contendere

(no contest), or if a corporation fails to appear, the court shall enter a plea of not guilty. If for any reason a plea has not been entered, the case shall for all purposes be considered as one in which a plea of not guilty has been entered.

18-12-102. Possessing an illegal weapon. (1) As used in this section, the term "illegal weapon" means a blackjack, bomb, firearm silencer, gas gun, machine gun, short shotgun, short rifle, metallic knuckles, gravity knife, or switchblade knife.

18-12-105. Unlawfully carrying a concealed weapon-unlawful possession of weapons. (1) A person commits a class 2 misdemeanor if he knowingly and unlawfully:

(b) Carries a firearm concealed on or about his person; or

29-5-103. Assignment of police officers or deputy sheriffs for temporary duty. The chief of police or person performing the functions thereof of any town, city, or city and county or the sheriff of any county may in his discretion, upon request of the chief of police or person exercising the functions thereof in any other town, city, or city and county or the sheriff of any other county, assign police officers or deputies under his control, together with any equipment he deems proper, to perform temporary duty within the jurisdiction of the requesting chief of police or sheriff and under the direction and command of such requesting chief of police or sheriff; but the chief of police or sheriff so assigning such officers or deputies may provide that such officers or deputies shall be under the immediate command of a superior officer designated by such assigning chief of police or sheriff, which superior officer shall be under the direct supervision and command of the requesting chief of police or sheriff. Nothing contained in §§29-5-103 to 29-5-110 shall be construed to limit the power of any town, city, or city and county to prohibit or limit by ordinance the exercise by a chief of police or sheriff of the discretion granted in §§29-5-103 to 29-5-110.

Amendments to Above

12-22-322, 1980 Cumulative Supplement. Violations-penalties.

(2) (b) Except as provided in subsection (6) of this section, whoever violates section 12-22-302 or 12-22-315 commits a class 4 felony and shall be punished as provided in section 18-1-105, C.R.S. 1973. A second offense and each subsequent offense thereafter by such person are class 3 felonies.

Source: Amended, L. 77, pp. 648, 873, §§2, 33; Amended, L. 79, p. 470, §1.

12-22-412, 1980 Cumulative Supplement. Violations-penalties-nonseverability. (1) Any person who manufactures or dispenses dangerous drugs in violation of section 12-22-404, except as provided in this section, commits a class 4 felony and shall be punished as provided in section 18-1-105, C.R.S. 1973.

Source: (1) to (4), IP (10), and (12) (g) amended and (11) R&RE, L. 77, pp. 874, 875, §§34, 35; (6.5) and (12) (j) added and (12) (g) amended, L. 79, pp. 473, 1015, 474, §§4,2, 1.

18-1-105, as amended by House Bill No. 1589. Felonies classified, presumptive penalties. (1) (a) Felonies are divided into five classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

The 1979 version reads:

Class	Presumptive Range
3	Four to eight years plus one year of parole
4	Two to four years plus one year of parole
5	One to two years plus one year parole

(6) In imposing a sentence to incarceration, the court shall impose a definite sentence which is within the presumptive ranges set forth in subsection (1) of this section unless it concludes that extraordinary mitigating or aggravating circumstances are present, are based on evidence in the record of the sentencing hearing and the presentence report, and support a different sentence which better serves the purposes of this code with respect to sentencing, as set forth in section 18-1-102.5. If the court finds such extraordinary mitigating or aggravating circumstances, it may impose a sentence which is lesser or greater than the presumptive range; except that in no case shall the term of sentence be greater than twice the maximum nor less than one-half the minimum term authorized in the presumptive range for the punishment of the offense.

Source: (1), (6), and (7), R & RE and (1) (c) amended, L. 79, pp. 669, 700, §§16, 69.

H.B. 1589, 1977 version, Colo. Sess. Laws 1977 Chapter 218 p. 867 §15

Class	Sentence
3	4½ years
4	2 years

5 18 months

The 1977 version also provided for a one-half increase in the sentence should extraordinary mitigating or aggravating circumstances be found.

The 1977 version contained a provision which stated that it pertained to all cases which had not become final 120 days prior to its effective date. Both the 1977 version and the 1979 version became effective on the same day and the final version reads as follows:

Section 23. Section 79 of chapter 216, Session Laws of Colorado 1977, as amended by section 1 of chapter 1, Session Laws of Colorado 1978, First Extraordinary Session, is amended to read:

Section 79. Effective date. This act shall take effect ~~April 4, 1979~~ July 1, 1979.

Section 25. Effective date-applicability. This act shall take effect July 1, 1979, shall apply to offenses committed on or after said date, and, notwithstanding any other provision of law or court rule, shall not apply to offenses committed prior to said date.

1981 Cumulative Supplement, 12-22-401 to 12-22-415. Repealed, L. 81, p. 741, §39, effective July 1, 1981.

18-18-105, 1981 Cumulative Supplement. Unlawful distribution, manufacturing, dispensing, sale, or possession. (1) (a) Except as authorized by part 3 of article 22 of title 12, C.R.S. 1973, it is unlawful for any person knowingly or intentionally to manufacture, dispense, sell, or distribute, with or without remuneration, to possess, or to possess with intent to manufacture, dispense, sell, or distribute, with or without remuneration, a controlled substance; or to induce, attempt to induce, or conspire with one or more other persons to manufacture, distribute, sell, or distribute, with or without remuneration, or to possess with intent to manufacture, dispense, sell, or distribute, with or without remuneration, a controlled substance.

(2) Any person who violates any of the provisions of subsection (1) of this section:

(a) In the case of a controlled substance listed in schedule I or II of part 3 of article 22 of title 12, C.R.S. 1973, commits:

(I) A class 3 felony; or

(c) In the case of a controlled substance listed in schedule IV of part

3 of article 22 of title 12, C.R.S. 1973, or marihuana or marihuana concentrate, except as provided in section 18-18-106, commits:

(I) A class 5 felony; or

(d) In the case of a controlled substance listed in schedule V of part 3 of article 22 of title 12, C.R.S. 1973, commits:

(I) A class 1 misdemeanor; or

COLORADO RULES OF CRIMINAL PROCEDURE

Rule 41: Copy of text included herein. Search, Seizure, and Confession.

Rule 48. Dismissal.

(b) By the Court.

(1) If, after the filing of a complaint, there is unnecessary delay in finding an indictment or filing an information against a defendant who has been held to answer in a district court, the court may dismiss the prosecution. Except as otherwise provided in this Rule, if a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months from the entry of a plea of not guilty, he shall be discharged from custody if he has not been admitted to bail, the pending charges shall be dismissed, whether he is in custody or on bail, and the defendant shall not again be indicted, informed against, or committed for the same offense, or for another offense based upon the same act or series of acts arising out of the same criminal episode.

(3) If a trial date has been fixed by the court, and thereafter the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional six months period from the date upon which the continuance was granted.

STATEMENT OF THE CASE

(g) ARGUMENT I

This issue is the first issue Appellant attempted to file in the courts. First by letter to the Judge and then through motions to the Courts. The reason Appellant raised this issue is because his former attorney only raised on point of error on appeal. Prior to this he had led Appellant to believe that he would appeal all issues that he had raised during the court proceedings held in this matter and all issues that had been raised in the Motion For New Trial. Appellant also had many disagreements concerning his attorney's handling of the pre-trial and trial proceedings. Appellant then became convinced that his attorney was acting as an amici curiae for the court rather than as an advocate of Appellant's cause. Due to these irreconcilable differences between Appellant and his attorney Appellant sought to proceed Pro Se. In support of his motions Appellant relied on the "deliberate by-pass rule" which states that a choice made by counsel not participated in by the petitioner does not automatically bar relief, Fay v. Noia, 372 US 391 (1963). Appellant also relyed on the "cause" and "actual prejudice" as stated in Wainwright v. Sykes, 433 US 72 (1977). Other cases Appellant relied on are: Scobie v. Oklahoma, 239 F.Supp. 646 (1965); Cruz v. Patterson 253 F.Supp. 805 (1966); Ellis v. United States,356 US 674 (1958); Draper v. Washington, 372 US 487 (1963); Griffin v. Illinois, 351 US 12 (1956); Coppedge v United States, 369 US 438 (1962); Eskridge v. Washington State Board of Prison Terms and Paroles, 357 US 214 (1958); Henry v. Mississippi, 379 US 443 (1964); Anders v California, 386 US 738 (1967); Warden v. Hayden, 387 US 294 (1967). Appellant has also recently added Engle v. Isaac, US No. 80-1430 and United States v. Frady, No. 80-1595, 71 L.Ed.2d 816 (1982) to this argument. Appellant was granted this motion by the Supreme Court of Colorado On January 15, 1981 and given leave to file a pro se brief in support of any arguments he wished to raise on appeal and the prosecution conceded to this on page 1 one of his brief. And yet the Court did not rule on all issues and did not grant Appellant a Limited remand to the trial court on the issues raised in his Motions For Rehearing. This was error and this case should be remanded so that a proper determination of all the issues presented herein can be properly ruled on and so that all remedies can properly be exhausted on all issues.

ARGUMENT II

This issue was first raised at the Motion to Suppress hearing held on

August 27, 1979, (Tr. 542-591). This was also raised in Appellant's Motion For New Trial and was believed to be Appellant's most meritorious point of Appeal at one time. This was not appealed however and is one of the principal reasons Appellant eventually decided to procede Pro Se. All issues concerning this issue have been properly raised throughout the proceedings as it has been in all of Appellant's motions and briefs to the court. Some of the aspects of this issue such as the search of the containers and suitcases in the trunk and the issues concerning the filling in of the blanks were not raised until Appellant was proceeding Pro Se.

The ruling of the Supreme Court of Colorado appears to uphold the seizure and later search of Appellant's car as incident to arrest. The car was not seized incident to arrest because Appellant was not arrested in the car but was arrested inside the motel room. Coolidge v. New Hampshire, 403 US 443 (1971). Appellant was arrested and handcuffed inside the motel room (Tr. 669-670, 1122-1145). There was also no reason to believe that Appellant or anyone else had access to the car or evidence thereof due to the fact that Appellant was jailed immediately after being arrested, there was no knowledge that anyone else had a key to the car or that anyone else even knew of Appellant's whereabouts. The seizure was also illegal as the car was parked on private property and no warrant of forfeiture or any violation of law was presented to warrant this seizure and no request by the owner of the property or Appellant was ever made to warrant the removal of the car from the motel parking lot (Tr. 691-695, 748-751). It is well settled law that a search incident to arrest is limited to the person of the defendant and the area "within his immediate control"--Meaning the area from within which he might gain possession of a weapon or destructible evidence. There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs. Such searches, in the absence of well recognized exceptions, may be made only under the authority of a search warrant. Chimel v. California, 395 US 752 (1969); Coolidge v. New Hampshire, supra; Terry v. Ohio, 392 US 1 (1968); Sibron v. New York, 392 US 40 (1968). Appellant was arrested in the motel room and that is the only place that could properly be searched as incident to arrest.

There was also no probable cause to support the seizure and later search of the car as incident to arrest. To support this contention it must be shown that there was probable cause to believe that there was contraband in the car

and that there exists a nexus--automatically provided in the case of fruits, instrumentalities or contraband--betweent the item seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. The validity of the probable cause must be appraised by the facts revealed to exist at the time of the seizure and not those later found to exist by the executing officers. Warden v. Hayden, 387 US 294 (1967); Stoner v. California, 376 US 483 (1964); Carroll v. United States, 267 US 132 (1925); Dyke v. Taylor Implement Mfg. Co., 391 US 216 (1968); United States v. Klein, 565 F.2d 183 (1977). The affiant stated that he was looking for residue left by the marijuana that had previously been in the car (Tr. 709-715). He says that he does not know how it gets there but some is always left in the place where marijuana has been stored or transported in. No search for residue was ever made for this residue inside the trunk of the car but only the suitcases and other containers were searched. This was clearly a search for evidence of crimes other than for what Appellant had been arrested for in the motel, sale of dangerous drugs, and even if they had been looking for the residue, this would not be evidence of the crime in question. Although both the evidence in the motel room and the evidence in the car was used to support the evidence of sale and possession (Tr. 893-895, 1614-1619), this was improper as the evidence in the car would only support a possession charge. The affiant could produce no other reason why he thought that contraband may be in the car. In fact, both the informant and the affiant stated that they had no reason to suspect that there was contraband in the car and did not know what was in it until it was searched (Tr. 630-631, 694-695, 662-663). Another case exactly like Appellant's is People v. Singleton, Colo., 482 P.2d 979 (1971). Thus there was no probable cause nor exigent circumstances justifying the seizure and later search of Appellant's car.

The search for traces of marijuana was illegal because,as previously stated, it was not a search for evidence of the crime for which Appellant was arrested and it is also not evidence which could be used as evidence of another crime as the mere traces or residue could not support conviction of another crime. People v. Theel, 505 P.2d 964 (1973); Fagin v. People, 505 P.2d 964 (1973).

All the cases relied on by the prosecution and in the decision of the Supreme Court of Colorado also support Appellant's argument rather than the

prosecution. Cardwell v. Lewis, 417 US 583 (1974) was not a search of the interior of any part of the car but involved the search of the outside of the car and was a plain view seizure. The other cases, Chambers v. Maroney, 399 US 42 (1970); United States v. Matthews, 615 F.2d 1279 (1980); Haefell v. Chernoff, 526 F.2d 1314 (1975); and People v. Meyer, Colo. 628 P.2d 103 (1981) all involved instances in which the defendant was arrested in his car rather than in his home or motel room or other place as in Appellant's case. All the searches also involved a search for evidence of the crime that had been committed by the defendant. Another case in support of Appellant's argument is Preston v. United States, 376 US 364 (1964) in which the defendant was arrested for vagrancy and the Court suppressed all evidence found in the car stating that it was apparent that the officers had no cause to believe that there was evidence of the crime of vagrancy concealed in the automobile.

The search of the car itself was not itself incident to arrest as the car was towed to a garage, impounded, and sealed by the police (Tr. 685-693, 748-753). As previously mentioned, Appellant was handcuffed upon arrest and incarcerated in the county jail. Thus the search must depend on the sufficiency of the facts contained in the warrant and affidavit. United States, v. Meier, 602 F.2d 253 (1979); Chambers v. Maroney, supra; Coolidge v. New Hampshire, supra; Stoner v. California, supra; Carroll v. United States, supra; Cardwell v. Lewis, supra; United States v. Matthews, supra; Dyke v. Taylor Implement Mfg. Co., supra.

The search warrant and affidavit did not meet the requirements of a finding of probable cause as set forth in Aquilar v. Texas, 373 US 108 (1964); Spinelli v. United States, 393 US 410 (1969); Steele v. United States, No. 1, 267 US 498 (1925); People v. Brethauer, Colo, 482 P.2d 369 (1971); Hernandez v. People, Colo., 385 P.2d 996 (1963); 16-3-303, C.R.S. 1973; Rule 41 Colo.R.Crim.P. 1973. All affidavits for search warrants must be based upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. In Colorado this affirmation must be reduced to writing and contained in the affidavit itself. As stated above, the affiant had no reason to believe that there was more contraband in the car. At (Tr. 685-690) the affiant states that he seized the car without a warrant in order to get a warrant to search the car. Therefore, not only was the car seized without probable cause but was also seized without a warrant. The affiant and the informant both stated that they had no reason to believe there was any more

marijuana in the car as stated above but yet they seized it in order to get a warrant to search it. The affiant and the prosecution both attempted to introduce evidence to support a finding of probable cause but they failed to include this in the warrant (709-715, 763-764). This is erroneous as the warrant validity must be appraised by the facts revealed to the magistrate and not those later found to exist by the executing officers. Aquilar v. Texas, supra; Spinelli v. United States, supra; People v. Brethauer, supra; Hernandez v. People, supra; United States v. Klein, 565 F.2d 183, 185 n. 4 and 8 (1977). The only things included in the warrant were events that allegedly occurred at appellant's house and a recitation of the events that occurred in the motel room. It is possible that probable cause may have been shown to search the house but there was clearly no probable cause to search Appellant's car. Other cases in support of Appellant's argument are: Giodenello v. United States, 357 US 480 (1958); Jaben v. United States 381 US 214 (1965); Nathanson v. United States, 290 US 41 (1933); Jones v United States, 362 US 257 (1960);Grau v. United States, 287 US 124 (1932); Byars v. United States, 273 US 28 (1927); Dumbra v United States, 268 US 435 (1903); People v. Drumwright, 475 P.2d 329 (1970); People v. Clavey, 530 P.2d 491 (1975); People v. Padilla, 511 P.2d 480 (1973); People v Arnold, 509 P.2d 1248 (1973).

The affiant further showed that the car search was exploratory by his use of the word "may" in the phrase "that a further quantity of dangerous drugs and/or traces of marijuana may be located in the above described car. This word means possibility and denotes that the search is an uncertain thing which may be fruitful, but if it were fruitful it would be remote or extraordinary. Black's Law Dictionary 5th Edition. He should have used a more positive word such as "is" which he used in the begining of the last paragraph of the affidavit which states "That this officer therefore has reason to believe that marijuana <u>is</u> located in the house of Richard Velasquez at 30 West North 4th Street in Montrose,". It is clear from this wording that the affiant was positive that there was marijuana in the house but was only guessing as to whether there was any in the car or not. This is because the informant had stated that he had previously observed marijuana in Appellant's house and this was contained in the warrant. However, no such reasons were contained in the warrant for the car. All the cases cited above support this paragraph also.

The affidavit and warrant also fail to particularly describe the place to be searched, and the things to be seized. This is because the affiant uses the word marijuana throughout the affidavit and then suddenly changes to the use of

both the words "dangerous drugs" and "marijuana" in the last paragraph of the affidavit. No explanation is given for this. Defendant concedes that marijuana is a dangerous drug but there are many different kinds of dangerous drugs and this term could mean many different kinds of drugs. Since the term marijuana was used throughout the affidavit in this case and in fact only this one kind of dangerous drug had been seen by the informant, the sudden change in terminology would lead a reasonable man to believe that something other than marijuana is being searched for. There was never any mention of any other kind of dangerous drug and there was no reason to use any other word than marijuana in this case. Even the affiant stated that he only had probable cause to believe that only traces of marijuana were thought to be located in the car. This was in his feeble attempt to explain his reasons for searching the car (709-715). People v. Brethauer, supra, also involved a similar situation. The affiant also failed to state where the car was located at. In the affidavit it appears that the car was located at Appellant's house rather than in the impound yard. The warrant and affidavit is also fatally defective because it fails to state what Judge of what court signed the warrant. The blank was also not filled in which states who the affiant appeared before and who is authorized to issue warrants in a criminal case. The Court summarily disposed of these last three contentions as being without merit in footnote 9 p. 13 of its opinion.

The court failed to rule on the issue of the search of the suitcases and other containers in the trunk without a warrant. This issue was first raised in Appellant's Opening Brief of May 12, 1981. This should have been raised as it is obvious that no probable cause existed to search these closed containers. This is because no search was made for the traces of marijuana in the trunk itself despite the fact that the affiant said he thought that these traces would have leaked out of the original container and fallen into the trunk. The only search that was made was of the containers inside the trunk itself. It is illogical for a reasonable man to hink that traces of marijuana would fall out of a closed plastic zip-lock bag that was inside another sack or box and go inside of another closed container inside the trunk. It would be logical to look for these traces on the floor of the trunk or on the outside of the containers rather than on the inside of the containers. There was also evidence that the bag and box in the motel room that was believed to contain the marijuana had no holes in them. A case in support of this issue is United States

v. Chadwick, 433 US 1 (1977); United States v. Chadwick, 532 F.2d 773 (1976); People v. Clavey, supra; Arkansas v. Sanders, 412 US 753 (1979); United States v. Stevie, 582 F.2d 1175 (1978); United States v. Schleiss, 582 F.2d 1166 (1978).

Thus all evidence should have been suppressed and Appellant remanded for a new trial. Wong Sun v. United States, 371 US 471 (1963); Beck v. Ohio, 379 US 89 (1964); Mapp v. Ohio, 367 US 643 (1961); Condon v. People, 489 P.2d 1297 (1971); all other cases cited herein.

ARGUMENT III

This issue was presented in Appellant's brief of May 12, 1981 as Argument V. This issue contains many issues that Appellant were in disagreement over throughout the proceedings. Appellant had no prior legal training and therefore did not know what to do about these things. Appellant did write to the trial Judge and filed motions with the courts concerning them and was thus allowed to proceed Pro Se and allowed to file motions concerning this. Some of the issues were not presented to the courts below because Appellant did not know at that time that he could do anything about them, but has since that time found case law to support these contentions and has thus discovered that they are in fact plain error. The Colorado Supreme Court ruled that there is not even a suggestion in the record that the defense counsel's representation was anything less than competent. Appellant was unaware of the date of the hearing and thus did not present any more argument prior to the hearing but presented all his research in his Motions For Rehearing. Appellant had intended to file a supplemental or reply brief prior to the hearing but was never informed of the fact that a hearing was set and thus was under the impression that one had not been scheduled as yet. Appellant now presents the following Argument which in its entirety plainly shows that Appellant's attorney's performance in this matter was totally incompetant and that Appellant did not have assistance of counsel at any stages of the proceedings.

Appellant was denied effective assistance of counsel from the time that the court dismissed the public defender from his case on March 20, 1979 and instructed to hire his own attorney. This was due to the fact that a sum of money, $1,919.00, that had previously been confiscated from Appellant was returned to him and the court thus ruled that Appellant could now afford to retain his own counsel. Appellant's bail had also been raised from $10,000 to $25,000 on March 8, 1979 and thus Appellant was left with the choice of making bail or attempting to hire an attorney, (Tr. 533-535). Appellant did attempt

to hire an attorney but could not find one that would take the case for less than $3,000 retainer. Since Appellant did not have this amount he decided to make bail and go to work and attempt to earn enough to hire an attorney. The bondsman agreed to 10% of the bond for his fee and allowed Appellant to pay the balance on an installment plan. It was error for the court to fail to appoint counsel for Appellant solely because he had money for bail. People v. Eggers, 188 N.E.2d 30 (1963). An indigent should be provided counsel at state expense. Gideon v. Wainwright, 372 US 335 (1963); Escobedo v. State of Illinois, 378 US 478 (1964); Palmer v. District Court, 398 P.2d 435 (1965).

The most obvious example of Appellant's attorney's incompetance is shown by his closing argument (Tr. 1625-1644). In this closing argument Appellant's counsel stressed to the jury that Appellant was guily and of bad character and the type of person no one would want to have as their child, would not want to associate with and that he was having a hard time coming up with good things to say about him. Thus, if the jury had any doubts up to that time, as to Defendant's guilt, they were all dispelled with this speech. It was obvious that Appellant's attorney was not prepared for trial nor had he fully researched and investigated Appellant's case and definitely had not prepared a defense. Although Appellant had not entered a plea, the court had previously entered a not guilty plea for him (Tr. 939) and Appellant proceeded to trial as if he had entered the plea himself. Appellant's counsel made his remarks with the knowledge of Appellant's earlier "not guilty" plea, and without Appellant's consent. He in effect entered a "guilty" plea for Appellant. The guilt or innocence of an accused is not a proper subject for argument to the trier of fact and the decision to plead "guilty" or "not guilty" is a decision reserved solely for the accused based on his intelligent and voluntary choice. Canon 7 (EC 7-24) of the Code of Professional Responsibility of the ABA; Boykin v. Alabama, 395 US 238 (1969). Doing so is plain error and requires reversal. Wiley v Sowders, 647 F.2d 642 (1981); Commonwealth v. Lane, 382 A.2d 460 (1978). Thus Appellant's attorney should have requested a continuance so that he could have properly prepared a defense and to properly investigate all aspects of this case as is stated above and below in this Jurisdictional Statement. The record as shown may show that Appellant's attorney did raise a few issues properly and did perform well enough to show that he is familiar with the procedures but the record as a whole plainly show that his performance was incompetant, particularly his closing argument. There were also many aspects of the errors that he did

raise that he could have raised but did not. These are all basic errors and which are plainly stated in the law books and which any experienced attorney should know about or could locate very easily with a little bit of research. Appellant's attorney was an experienced attorney and should have been able to do this. He plainly did not have time to properly research this case and the fact that Appellant has since raised many issues in his behalf despite the fact that he has no prior legal training is further evidence of the fact that his attorney did not do a proper job. Thus Appellant should be granted a new trial and given sufficient time in which to prepare.

Additional errors that Appellant's attorney committed are as follows:

He failed to introduce the inaudible tape recording into evidence and also failed to have this tape recording analyzed. An expert could have been retained to analyze this tape as it would have proved to be exculpatory evidence for Appellant. This is shown by the confusion in the testimony of the informant and the arresting officers. They all did not hear all the testimony and did not take notes of any kind. They used the tape recording to refresh their memories. Appellant was told by his attorney that the tape was inaudible and yet this fact was not introduced into evidence. This was clearly incompetant and these facts are further discussed in Argument VII.

Appellant's attorney also failed to adequately argue and investigate the circumstances surrounding the identification of the substance charged in Count V. This is the alleged morphine and codeine. It is obvious that the prosecution has failed to prove that this substance was in fact a narcotic (Tr. 213-218, 248-262, 1277-1298, 1484-1495). The prosecution's experts performed many tests on this substance before an opinion could finally be formed as to what they thought this was. Even then no positive identification was made. Mr. Springer, Appellant's attorney, failed to obtain any evidence to positively rule out narcotics in this instance despite the fact that Appellant questioned him why the defense did not get an expert witness and have an independent test test of our own done on this substance. The prosecution's experts stated that there were many impurities in the substance thus making identification difficult (Tr. 255-260). There was testimony that it was opium incense (Tr. 260). That it was a possible opium alkaloid (Tr. 249, 1291, 1474). That opium is a complex mixture containing approximately twenty other alkaloids (Tr. 1474). No quantitative analysis was done (Tr. 1491-1495). A quantitative analysis should have been done as it is obvious from the testimony of the prosecution's witnesses

that a very minute quantity of narcotic, if any, was involved in this case. Thus it could possibly not be a crime. People v. Theel, 505 P.2d 964 (1973). Since there was testimony that there were many other substances present in this substance, it is also possible that this substance was not a narcotic but could have been one of the substances listed in 21 USCA 812 Schedule of controlled substances V which are now classified as misdemeanors pursuant to 18-18-105 (2) (d) (I), Colorado Session Laws 1981, Chapter 128 p. 730. There was no attempt to identify the impurities in the alleged substance (Tr. 258-259). If the impurities and other alkaloids would have been identified, it's possible that the substance would also be classified under Schedule III or V which contain minute quantities of narcotic combined with other substances. A schedule III drug is now punishable as a class 4 felony. The substances listed in schedule V are also listed in 12-22-308, C.R.S. 1973, as amended 1978 which were and are now punishable pursuant to 12-22-322, C.R.S. 1973, as amended 1978 (2) (a). At that time this type of crime could be punished by a maximum of five years in the penitentiary and is now punishable as a class 1 misdemeanor with a maximum of two (2) years in the county jail. If a proper identification of the alkaloids would have been done its possible that they could have been identified as one of the alkaloids that is not illegal. In Schedule II (2) it specifically excludes the isoquinoline aldaloids of opium from the controlled substance act. Schedule II (I) also excludes apomorphine, dextrorphan, nalbuphine, naloxone, naltrexone and their respective salts. Noscapine, papaverine, narceine, and cotarnine are excluded in 12-22-301 (16), C.R.S. 1973, as amended 1978. Thus it is obvious that independent testing should have been performed by the defense by their own expert.

Appellant's attorney also failed to raise the issue that there was insufficient evidence to warrant a conviction for both Counts I and II of the Information and was thus convicted in violation of the constitutional proscriptions against double jeopardy. As to count I, there was no evidence presented that Appellant solicited or brought about a sale but all the evidence presented states that the informant was responsible for this and thus Appellant should have only been found guilty of possession for sale rather than sale (Tr. 1062-1065). People v. Morris, Colo., 515 P.2d 131 (1976); People v. Patterson, Colo., 532 P.2d 342 (1975). A Defendant cannot be found guilty of both possession for sale and for possession. This also violates equal protection and due process.

Appellant's attorney also failed to object to the jury instructions as they were not adequate and failed to properly instruct the jury as to all the elements of the offense. The only elements presented in instruction No. 17 were for knowledge that it is a narcotic drug. The same knowledge instructions were also given for the dangerous drug charges in instructions No. 13 and 14. They failed to include the instructions for intentionally or willingly or for physical or constructive possession. Due process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 US 358 (1970). Instruction No. 23 also included many other drugs irrelevant to this case and the mention of which is also prejudicial to any trial, particularly heroin. The instruction also contained the charge of opium, morphine, and codeine. Morphine and codeine are derivatives of opium and thus if opium is present a person cannot also be charged with possession of each individual alkaloid in the drug. Opium contains approximately twenty alkaloids and in this case only two were thought to be present and thus Appellant should not have been charged with possession of opium and this should not have been presented to the jury.

ARGUMENT IV

This is an issue that Appellant has raised since the sentencing hearing (Tr. 1755-61). Appellant also included this in his Opening Brief of May 12, 1981. H.B. 1589 became effective July 1, 1979. This was prior to Appellant's trial of September 17, 1979. This bill contained two provisions which became effective on the same date, §23 and §25. Appellant was unaware of these two sections until he had an opportunity to study them in detail. The courts have summarily dismissed this argument stating that this bill had prospective application only. People v. McKenna, Colo., 611 P.2d 574 (1980).

Appellant also did not contest the sentence for Count V as he had originally thought that he had been convicted as a second offender for this crime and thus the sentence under §25 of the new bill would be similar to the one he already had as a class 3 felony carries a 4-8 year sentence under this section. 25 contained provisions for a 2-4 year sentence for a first offender and Appellant has since discovered that he was in fact convicted as a first offender. Count I is also a class 4 felony and contains a 2-4 year sentence under §25. Appellant subsequently discovered that §23 of the first version of H.B. 1589 also became effective July 1, 1979. Tacorante v. People, Colo., 624 P.2d 1324 (1981). Thus even if Appellant would have been convicted as a second offender

on Count V he could receive a 4½ year sentence under 23 and a two (2) year sentence for a first offense for which he was actually convicted. Appellant could now receive an eighteen (18) month sentence for Count I. This first version of H.B. 1589 is the 1977 version and it pertained to all cases that were not final before its effective date and those that were sentenced after the effective date. The first version was amended at the 1st Extraordinary Session in 1978 to take effect April 1, 1979 and the General Assembly postponed its effective date again at the 1979 session to become effective July 1, 1979. Appellant also submitted a copy of a brief,written in behalf of Edward Montoya, No. 80CA1257, to the Supreme Court of Colorado in support of this issue. Edward Montoya apparently has been granted a hearing on this issue in the Court of Appeals of Colorado. Appellant presented all this research in his Motions For Rehearing.

In addition to the above, Appellant has discovered that the drug laws have been changed again. Count I, Dispensing a dangerous drug, is now a class 5 felony pursuant to 18-18-105 (2) (c) (I), Session Laws 1981, Chapter 128, p. 730. This bill does not contain any language making it prospective only and thus it is retroactive and applies to Appellant's case. Thus Appellant is entitled to be sentenced under the presumtive range of one(1) to two (2) years. The changes in this law also classify marijuana as a class 5 felony. It was previously an unclassified offense and thus even if Appellant was to be sentenced under the legislation in effect in 1978 and the legislation that he was sentenced under, Appellant should be resentenced to a maximum of 5 years. A class 5 felony in 1978 carried a maximum of 5 year penalty in the penitentiary. The changes in this Session also classify Count 5 as a class 5 felony or a class 1 misdemeanor should Appellant be able to prove the facts as state in Argument III but would otherwise not affect Appellant's sentence. Thus Appellant should be resentenced under the amendatory legislation mentioned above. This Argument was previously Argument VI in the May 12, 1981 Opening Brief.

A defendant is entitled to the benefits of amendatory legislation which mitigates the penalty for crimes about the relief is sought before finality has attached to the judgment of conviction. Dalbert v. Florida, 432 US 282 (1977); Linkletter v. Walker, 381 US 618 (1965); People v. Bloom, 577 P.2d 288 (1978); People v. Jenkins, 575 P.2d 10 (1977); Litsey v. District Court, 565 P.2d 1343 (1977); People v. Vigil, 570 P.2d 13 (1977); People v. Henderson, Colo. App., 574 P.2d 872 (1977); People v. Truesdale, 548 P.2d 494 (1976); People v. Marlott,

532 P.2d 401 (1976); Glanier v. People, 565 P.2d 935 (1976); People v. Loger, 535 P.2d 210 (1975); McClure v. District Court, 532 P.2d 340 (1975); Shook v. District Court, 533 P.2d 41 (1975); Naranjo v. District Court, 536 P.2d 36 (1975); People v. Thomas, 525 P.2d 1136 (1974); People v. Thornton, 529 P.2d 628 (1974); People v. Race, 529 P.2d 629 (1974); People v. Andersen, 529 P.2d 310 (1974).

The failure to sentence Appellant under the new laws because failure to do so violates the equal protection clause. Appellant has not been able to research this point adequately but if the Court deems it proper Appellant will brief this to the Court also. It involves the changes concerning good-time-credits for inmates and the parole elegibility. Appellant only recently became aware of this issue upon his incarceration to the Department of Corrections of Colorado. Under the new laws an inmates good time is vested every six months and cannot be taken from him, only good time earned within the six month period can be lost for an infraction. Under the old laws an inmate could lose all his good time for infractions of the rule, this means all the time he has earned since he began serving his time. The inmates under the new laws are also granted an automatic parole no matter how many infractions they have committed while the inmates under the new laws must still meet the parole board and have an uncertain parole date. All the inmates serving time under both the new and old laws are housed in the same facility and are subject to the same rules and regulations. Appellant is now investigating the extent to which the old good time rules are enforced on the inmates or if the majority are treated the same as the inmates under the new legislation. It is obvious that all are not treated the same.

ARGUMENT V

This argument has been raised at all stages of the proceedings. It was raised immediately before trial (Tr. 801-839) and also raised in Appellant's Motion For New Trial. It was not appealed however and Appellant presented it as Argument II in his Opening Brief of May 12, 1981.

The United States Supreme Court has firmly established that the speedy trial application of the Sixth Amendment begins when the defendant becomes an accused which in most cases is the date of the indictment. United States v. Marion, 404 US 307 (1971); Strunk v. United States, 412 US 434 (1973); Barker v. Wingo, 407 US 514 (1972); Smith v. Hooey, 393 US 374 (1969); Moore v. Arizona, 414 US 25 (1973); Klopfer v. North Carolina, 386 US 213 (1967); Dickey v. Florida, 398 US 30 (1970).

The Federal right to a speedy and public trial is enforceable against the

states by virtue of the Fourteenth Amendment "as one of the most basic rights preserved by our Constitution". Klopfer v. North Carolina, supra. The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendant. A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest. Barker v. Wingo, supra at 527. Similar statements appear in Dickey v. Florida, supra; Hodges v. United States, 408 F.2d 543, 551 (CA8 1969).

As a matter of Federal constitutional interpretation the entry of a plea is not required before the Sixth Amendment applies to the defendant but rather that the defendant in some way becomes an accused, which is generally on the date of the indictment; cases cited above. The United States Supreme Court stated that they find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months as such a result would require the Court to engage in legislative or rulemaking activity, rather than in the adjudicative process. They ruled, however, that the states, of course, are free to prescribe a reasonable period consistant with constitutional standards, but their approach must be less precise. Baker v. Wingo, supra, at 523. Colorado has adopted such a rule requiring trial to be had within six months. Colorado has also adopted an additional rule, requiring that the speedy trial time period does not commence to run until a plea has been entered. Sweet v. Myers, 612 P.2d 75 (1980); Sanchez v. District Court, 612 P.2d 519 (1980); Rance v. City Court in and For City of Jefferson, 564 P.2d 422 (1977); Potter v. District Court, 525 P.2d 429 (1974); People v. Wilkinson, 555 P.2d 1167 (1976); People v. Dunhill, 570 P.2d 1097 (1977).

It is firmly established that each state has the authority and power to impose higher standards governing police practices under State Constitutional law than is required by the Federal Constitution. Oregon v. Haas, 420 US 714, 719 (1975); Lego v. Twomey, 404 US 477, 489 (1972); Cooper v. California, 386 US 58, 62 (1967); Barker v. Wingo, supra. In fact, state courts are increasingly according protections once provided as Federal rights but now increasingly depreciated by decisions of the United States Supreme Court. State v. Santigo, 492 P.2d 658 (1971); People v. Disbrow, 545 P.2d 272 (1976); State

v. Johnson, 346 A.2d 66 (1975); Commonwealth v. Campana, 314 A.2d 854 (1974).

Although the United States Supreme Court allows the individual states to require a trial to be had within a prescribed number of days, this does not also allow states to impose standards by which the courts can intentitonally by-pass the defendant's speedy trial rights. This is what the requirement of entering a plea before the speedy trial period begins amounts to. This is imposing a lower standard rather than a higher standard. In Appellant's case, the trial was set on March 8, 1979 for September 17, 1979. This is clearly more than six months. The speedy trial time period is 180 days. Simakis v. District Court, 577 P.2d 3 (1978). Appellant's motion for dismissal was denied (Tr. 834) because there was no plea entered and the court also stated that the motion was not timely. (Tr. 801-840). The discussion of the trial setting and Appellant's failure to enter a plea appears at (Tr. 421-455). Although the court and the public defender discussed the six-month speedy trial rule on March 8, 1979, they completely ignored it in this case. They discussed a trial date being available on August 27, 1979. This date was rejected because the public defender was going on vacation that week (Tr. 448). The trial date was then set for September 17, 1979 based on the fact that the speedy trial period had not begun yet since no plea had been entered. This is clearly an abuse of discretion on the part of the court and the public defender. They avoided Appellant's right to a speedy trial in order to afford a vacation for the public defender. A vacation is not a valid excuse to ignore the constitutional rights of a defendant, who, in the meantime will be sitting in jail. Appellant's bond was raised that same day and Appellant was ordered to report to the custody of the sheriff. Appellant did not bond out for some time after that and it was uncertain whether he ever would. This amounted to a lessening of the Sixth Amendment speedy trial right because it allows the court to manipulate the trial date in order for vacations to be had or whatever other liesurely activity that is deemed more important than the Sixth Amendment. The public defender should have been ordered to appear on the date available or new counsel should have been appointed. People v. Johnson, 606 P.2d 738 (1980).

As for the timeliness of the Motion to Dismiss, both the Federal and State constitutions require only that it be made before trial commences. Harrington v. District Court in and For County of Morgan, supra. In Appellant's case the trial had not commenced as yet, the jury had not even been picked nor impaneled

yet. It was the day of trial and as Appellant's attorney stated at (Tr. 828), that he had only discovered the speedy trial issue within the last several days. Appellant's attorney couldn't have discovered it any sooner anyway since he had only been retained approximately 30 days prior to this.

As to waiving his right to a speedy trial, it has been held that mere silence to a trial setting beyond the speedy trial period shall not be construed as a waiver of a defendant's right to a speedy trial. It was further held that in such situations an express waiver or other affirmative conduct evidencing a waiver of the right to a speedy trial must be shown before a trial court may deny a dismissal motion. Harrington v. District Court, supra. Nowhere in the record does it show that Appellant waived his speedy trial rights nor waived entry of plea. On March 8, 1979 the court instructed the public defender to consult Appellant about a plea (Tr. 448). This was never done and the court also failed to consult Appellant as to whether he wished to enter a plea or not. At that time Appellant did not know that a plea was necessary in order for his speedy trial period to begin, Appellant did not even know what having a speedy trial meant. Appellant had never studied law before and only started doing so in the summer of 1979 as it appeared as if he would have to defend himself. It was the duty of the court to inform Appellant of his speedy trial rights and to protect those rights. Barker v. Wingo, supra. The court advised Appellant of his other rights and explained the charges to him (Tr. 393-421). The court addressed Appellant personally of these rights and other charges but did not do this for Appellant's speedy trial rights nor whether he wished to plea but kept this discussion between the court and the public defender. The court stated that it would ask Appellant if he wanted to enter a plea (Tr. 421) but never did do this. The court also concedes that the failure of Appellant to enter a plea was not his fault (Tr. 835). A man should not be presumed to have exercised a deliberate choice because of silence or inaction that could equally mean that he is unaware of the necessity for a demand. Barker v. Wingo, supra. As for demanding a speedy trial, Colorado has rejected the demand rule. Hicks v. People, 364 P.2d 877 (1961); Harrington v. District Court in and For County of Morgan, supra; Rance v. City Court in and For the City of Jefferson, supra. As for the contention that Appellant requested continuances of the date for enter of plea, this is without merit as Appellant only asked for a continuance of time inorder to obtain counsel. In any event, no continuances

of the trial were ever given and the trial setting remained the same from the time of the setting on March 8, 1979 until trial was had. There was actually no reason to request a continuance in order for Appellant to retain counsel as the public defender should have remained appointed until Appellant did retain counsel of his own and Appellant had requested so. These continuances are also meaningless as Appellant has the right to retain counsel at any time he wishes and does not need a continuance to do so. A trial date should not have been set until Appellant was represented by counsel.

The date of the trial setting is equivalent to an entry of plea as a trial date should not be set until a plea has been entered (Tr. 802-812). Also, according to 16-7-208, C.R.S. 1973, as amended, if a defendant fails to plead, the court shall enter a plea of not guilty. If for any reason a plea has not been entered, the case shall for all purposes be considered as one in which a plea of not guilty has been entered. Therefore a plea should have automatically been entered for Appellant, and even if one was not, the plea should be considered to be entered at the arraignment on March 8, 1979 and the speedy trial time period actually began on that date.

Appellant has been unable to discover another case with a single continuance that exceeds six months but 16-1-405, C.R.S. 1973, as amended, and 16-1-405 (3), C.R.S. 1973, as amended, plainly state that a continuance shall not exceed six months. Rance v. City Court in and For City of Jefferson, supra, seems to suggest that the trial setting involved the same circumstances as Appellant but no dates are mentioned in the case. Appellant's attorney also suggests that there is no case law on this particular point in Colorado (Tr. 824). Thus it is obvious from the above that Appellant's Constitutional right to a speedy trial have been violated and thus all charges must be dismissed. United States v. Marion, supra; all other cases cited above.

ARGUMENT VI

This issue has been raised throughout the proceedings and was an issue mentioned in the Notice of Appeal. This is also another issue which Appellant's attorney did not appeal and it appears as Argument III in Appellant's Opening Brief of May 12, 1981. The entire discussion at the Motion to Suppress hearing of August 27, 1979 appears at (Tr. 697-705, 742-744).

This issue involves an arrest that was the result of an investigation by the Montrose City Police that was conducted outside the city limits and thus outside their jurisdiction. The Montrose Police also consulted with the

Colorado Bureau of Investigations (CBI) acting as advisors (Tr. 699-701). No warrant was ever obtained by the Montrose City Police to conduct this investigation. The Montrose City Police also sought to explain their authority to conduct an investigation outside the city limits by stating that the officer in charge, Charles R. Sellers, carries a Deputy's card and had been specially deputized to be a Deputy by the Montrose Sheriff thus making him a City Police Officer and a Deputy Sheriff at the same time (Tr. 702-705). This is without merit however as an officer cannot be a City Police Officer and a Deputy Sheriff at the same time and there are no provisions for such a procedure in either the Statutes of Colorado or the City Ordinances of Montrose. The only provisions in the Statutes for assignment of City Police Officers as Deputy Sheriffs is for temporary duty as stated in 29-5-103, C.R.S. 1973, as amended. This statute only permits this at the request of the chief of police or sheriff of another county. There were no requests for this from officers of any kind from any other county. This was an investigation made by the City of Montrose Police by their own officers at their own request. This statute also states that an officer that is assigned for temporary duty shall be under the immediate command of a superior officer designated by such assigning chief of police or sheriff, which superior officer shall be under the direct supervision and command of the requesting chief of police or sheriff. The officers were not assigned to any other department but were working for their own Department during regular assignment rather than temporary duty. Detective Sellers was also the supervisor of the whole operation and was not under the supervision of anyone, although he was legally subject to the supervision of the Montrose Chief of Police. Thus the investigation was conducted by the Montrose City Police outside the city limits without a warrant and thus the presence of the CBI was the fruit of this illegal investigation and therefore the arrest was also illegal and it and all the fruits thereof must be suppressed. Wong Sun v. United States, 371 US 471 (1963); Condon v. People, 489 P.2d 1297 (1971); Weeks v. United States, 232 US 383 (1914); Mapp v Ohio, 367 US 643 (1961). There are no ordinances that state that officer Sellers could be a City Police Officer and a Deputy Sheriff also. Such a procedure can only be condoned by statute or ordinance pursuant to the Home Rule Amendment, Article XX §6 of the Colorado Constitution. International Brotherhood of Police Officers, Local No. 127 v. City and County of Denver, 521 P.2d 916 (1974). The conduct of the police has not been approved in this type of situation in other cases.

People v. Schultz, 611 P.2d 977 (1980); People v. Wolf, 635 P.2d 213 (1981). These two cases involved situations where the initial police activities began in their own jurisdiction and then led outside of it. In Appellant's case the investigation was being conducted outside the city limits and Appellant was lured from inside the city limits to the motel outside the city limits. Calling for the assistance of the CBI to effect the arrest would only have been proper if the Montrose City Police would have had a warrant or other legal authority to be conducting an investigation outside their jurisdiction.

ARGUMENT VII

This argument has been raised throughout the proceedings. This is the only argument Appellant's attorney appealed and an Opening Brief was filed in the Court of Appeals on May 19, 1980 on behalf of Appellant. Appellant agreed with his attorney that this was a meritorious point of appeal but that a Federal question should also be raised, Appellant's attorney only raised the question of a violation of State constitutional grounds only. Appellant raised this in his Opening Brief as Argument I. The Supreme Court of Colorado appears to have only ruled on the State ground also although it mentioned Federal cases in its opinion.

Appellant relied on the following cases for his argument. Katz v. United States, 389 US 347 (1967); Berger v New York, 388 US 41 (1967); United States v. White, 401 US 745 (1971); Desist v United States, 394 US 244 (1969). The White decision was based in part on the non-retroactivity of Katz and therefore Appellant relied on the strictures of Katz for his argument. These cases have apparently been overruled by United States v. Caceres, 440 US 741 (1979) and therefore Appellant's argument has lost some of its merit. Appellant's case does differ from the cases above in several respects however.

The bug in this case was placed in a location rather than on the person of the informant as was done in all of the above cases (Tr. 566). This was error. United States v. Padilla, 520 F.2d 526 (1975); Electronic Eavesdropping and the Right to Privacy, 52 B.U.L. Rev. 831 (1972). This type of procedure allows the agents outside to listen even if the informant is not present and would allow a situation where the whole conversation might not be heard. There were many interruptions in the conversation in this case (Tr. 661).

The purpose of a bug is also to have a more accurate version of the events in question. United States v. White, supra. All the cases mentioned above that have allowed the officers listening outside to testify at trial have also intro-

duced the tape recording into evidence to corroborate the testimony of the agents. The agents testimony should have been suppressed in this case as it was all unreliable. The informant's testimony was so incredible that the Court even admonished him as being unreliable and unpredictable (Tr. 11058). At trial, police informant Walsh testified that although he was remembering things differently at trial (Tr. 972), had smoked marijuana with Appellant and on other occasions (Tr. 974-975; 985; 1010), could not remember dates (Tr. 931-932, 961), took no notes of the meetings with Appellant (Tr. 961-962, 969), made other investigative contacts with other individuals on a daily basis (Tr. 960-969), could not remember how long he met with Appellant (Tr. 972, he could recall purchasing marijuana from Appellant on December 22, 1978 (Tr. 917-925). It is highly unlikely that the informant's memory could be so faulty. The theory of primacy and recency holds that a person generally remembers the first and last meetings or happenings between persons. The informant could remember neither and thus it is suspect that any of what he said actually happened, especially since he didn't take any notes during his investigative activities. The agents testimony was just as suspect. Officer Sellers stated at (Tr. 658) that Appellant was hard to understand, and yet at (Tr. 1105-1107) he states that he did hear a sale take place although he said he wasn't quoting Appellant exactly. At (Tr. 661) officer Sellers states there were many interruptions in the conversation. He further states at (Tr. 660-664) that Appellant was encouraging the informant to give him the money so he could go to Grand Junction to purchase sesamian marijuana. He also states that there was other discussion that he doesn't remember. At (1222-1229) officer Sellers states he paraphrased the conversation between the Appellant and the informant. He states that he didn't take any notes on the conversation, although he took notes on everything else and which is standard procedure. In his testimony, officer Sellers states that taking notes is standard procedure in police work and is done routinely in all investigations that he does, and yet he failed to do so in this instance. Why?! As for Agent Konkel, he states at (Tr. 1531) that he only heard talk of marijuana and of Walsh counting money. He never states that he heard a sale take place. It is plain from the above discussion that an accurate version of the events and conversation was not presented to the court. No sale actually took place. The plan was for Appellant to take the informant's money and go to Grand Junction to look for some sesamian marijuana. No promises were made, it was just agreed that it may be possible to locate some there. The agents should

not have been allowed to testify unless the tape recording was introduced in evidence also. A warrant should have been issued before the bug was placed in the room and most definately should have been issued before the agents could be allowed to listen and record the conversation from outside. The warrant should also stress that a proper tape recording be made of the conversation if the agents are to be permitted to testify and an instruction should be presented to the jury explaining why a tape recording is not being used if in fact one was made.

It is well established that the testimony of an informant is allowed at trial without a warrant but many jurisdictions require that a warrant be issued before the informant is allowed to wear a bug on his person, to place a bug in a location or to allow agents listening in on the conversation to record such conversation or to testify to its contents. People v. Beavers, 227 N.W.2d 511 (1975); Tollett v. State, 272 So2d 490 (1973); State v. Brackman 582 P.2d 1216 (1978); State v. Coleman, 616 P.2d 1090 (1980); State ex. rel. Arnold v. County Court of Rock County, 187 N.W.2d 354 (1971); Wallace v. United States, 412 F.2d 1097 (1969); State v. Wanrow, 559 P.2d 548 (1977); State v. Glass, 583 P.2d 872 (1978); State v. Thornton, 583 P.2d 872 (1978); Aldridge v. State, 584 P.2d 1105 (1976); Coffey v. State, 585 P.2d 514 (1978); Hammond v. State, 354 So.2d 280 (1977); State v. Boone, 581 P.2d 571 (1978); Franco v. State, 376 So.2d 1168 (1979); People v. Mosley, 370 N.E.2d 1240 (1978); White v. Davis, 533 P.2d 222 (1975); State v. Sarmiento, 397 So.2d 643 (1981). Thus the United States Constitution should also afford such protection to its citizens.

The Supreme Court of Colorado also erroneously relied upon three or four prior allged sales between Appellant and the informant. This appears on p. 3 of the opinion. These alleged sales were never proven and the evidence surrounding them was so incredible that the court did not allow them into evidence. There were no offense reports and they were ruled hearsay only (Tr. 842-867). (h). Appellant raised both State and Federal Constitutional issues in all his arguments and were all plain error and thus the court should have ruled on both State and Federal grounds on all issues. This is also the issue in Argument VIII. Thus these questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution in the Supreme Court of the United States of America. They all present plain error and warrant reversal of the decision of the Supreme Court of Colorado.

ARGUMENT IX

Appellant should have been granted a Rehearing in this matter because he had not been notified of the date of the hearing and thus was under the impression that no hearing date had been set yet. Appellant had been preparing for the hearing for some time and had much to add to his Opening Brief of May 12, 1981. Appellant had been under the impression that he would be allowed to file a supplemental or reply brief prior to the hearing. Colorado Appellate Rule 30 states that the Appellant must file a reply brief at least three (3) days before argument. Appellant had intended to file a brief concerning his research since May 12, 1981 more than three days prior to the hearing but was denied this opportunity since he was not informed of the hearing. Appellant also thought he might be given Oral Argument pursuant to Colorado Appellate Rule 34. Appellant first found about his hearing in the newspaper when an inmate showed him the article in the Denver Post, February 17, 1982. Appellant was given the opportunity to file a Motion For Rehearing and in fact filed two (2) of them, one dated March 2, 1982 and one dated March 22, 1982. It is obvious the Supreme Court of Colorado misinterpreted and overlooked all of Appellant's argument and this was clearly pointed out in Appellant's Motions For Rehearing and thus Appellant should have been granted a Rehearing.

ARGUMENT X

The Supreme Court of Colorado erred in not granting Appellant a Limited Remand to the trial court. Appellant has discovered many issues that are plain error in this case since beginning his research in this case and this is the reason he requested a limited remand to the trial court or permission to file a Rule 35 motion while this appeal is pending. Rule 35 of the Colorado Rules of Criminal Procedure is the Rule that contains the provisions for collateral relief from convictions in Colorado. Many of these issues have not previously been presented to the courts below and thus all appellate remedies have not been exhausted. Many of the issues that have been properly presented to the courts also have been changed and present issues not properly presented to the courts and that all appellate remedies have not been exhausted. Appellant was unable to discover what the proper procedure is for adding these other issues and asked the courts for advice but received no help from them. They stated that they could not advise Appellant as to procedure. Appellant has read conflicting court decisions concerning the adding of points of error to an appeal that were not in the original appeal and the filing of another appeal while

another appeal is pending in the same case. Some say that it is proper to add points of error to an appeal if they are plain error, some say that another appeal can be filed while another is pending, some say that filing another appeal while one is pending in the same case would jeopardize the case and it could be dismissed, and some say that a compelling need for another appeal must be shown. People v. Hampton, 528 P.2d 1311 (1974); People v. West, 592 P.2d 22 (1979). And finally Appellant read that the proper procedure is to request a limited remand to the trial court or permission from the appellate court to file Rule 35 motions below while another appeal is pending in another court above. People v. District Court, Colorado Supreme Court, No. 81SA417, December 14, 1981. Appellant filed such a request dated March 22, 1982 which accompanied Appellant's Motion For Rehearing dated the same day.

Appellant's need is also evident due to the fact that should he be ruled to be entitled to the amendatory legislation mitigating the penalties for his crimes he will have done all his time by the time he could present this issue to the court and thus it could possibly be ruled moot. If Appellant would be ruled to be sentenced to two (2) years under the new laws he would be eligible for release in December of 1982 if he earns all his good time. Appellant mentioned this possibility in his Motion For Stay and Bail Pending Review and Remand dated March 22, 1982 and also accompanying the Motion For Rehearing and Motion For Remand dated the same day.

Appellant also has another reason for a present need to present these issues to the Court at this time. Appellant now has other charges pending, these arose out of the incident in which Appellant's Appeal bond was revoked, which are being inhanced under recidivist statutes due to the fact that Appellant has previously been convicted of the charges that are the subject of this appeal. These appear in counts III and VI of the Amended Information in Action No. 82CR2, a copy is included herein. The original Information has been filed since January 1982 and the Amended Information was mailed to Appellant May 26, 1982. Thus Appellant has decided to request this Honorable Court to do one of the following:

(1). Consider all of the above arguments at this time despite the fact that all appellate remedies have not been exhausted on all the issues as they all present plain error.

(2). Allow Appellant to present another appeal pursuant to Rule 35 of the Colorado Rules of Criminal Procedure pertaining to the issues that

all appellate remedies have not been exhausted while this Appeal is pending pertaining to all issues that all the appellate remedies have been exhausted.

(3). Remand the entire Appeal to the trial court in its present revised form. This will give the trial court an opportunity to make a proper decision on the Appeal as it now stands.

Another reason Appellant has encountered to warrant a necessity to allow another Appeal at this time is that he has read hints in some of the cases that he has read that a challenge to a prior conviction in a recidivist charge must be made prior to trial. Thus Appellant must raise these issues now as his trial for the recidivist charge is scheduled for June 30, 1982. Appellant also plans to request that these new issues be ruled on in the trial court prior to trial due to this fact but he in no way wishes to jeopardize this appeal by doing so and thus requests this court permission to do so.

WHEREFORE, Appellant requests that he be granted probable jurisdiction on the foregoing grounds.

DATED JUNE 16, 1982.

Respectfully Submitted,

Richard Velasquez

Richard Velasquez, Pro Se #01756
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, CO 81212

SUPREME COURT, STATE OF COLORADO

Case No. 80 SA 517

APPEAL FROM THE DISTRICT COURT, MONTROSE COUNTY, NO. 79CR11

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

vs.

RICHARD VELASQUEZ,

Defendant-Appellant.

Upon consideration of the Motion for Advisory Counsel, Petition to Reconsider Petition for Rehearing, Petition for Limited Remand to Trial Court and Discovery, and Petition for Stay and Bail Pending Review and Remand filed by the Defendant-Appellant herein, and now being advised in the premises,

It Is This Day Ordered that said Motion and Petitions shall be, and the same hereby are, Stricken.

BY THE COURT, APRIL 21, 1982

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

APR 22 1982

DAVID W. BREZINA
Court Clerk of the Supreme Court
Seal By L. Eldridge
Deputy Clerk

cc: Richard Velasquez
P.O. Box 700-01756
Canon City, CO 81212

William Morris
Assistant Attorney General

Clerk of the District Court
Montrose County Courthouse
300 So. First
Montrose, CO 81401

SUPREME COURT, STATE OF COLORADO
Case No. 80SA517
Appeal, District Court, Montrose County

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

vs.

RICHARD VELASQUEZ,

Defendant-Appellant.

ORDER

Upon consideration of the Petition for Rehearing filed by the Defendant-Appellant in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, MARCH 15, 1982.

cc: Richard Velasquez
Box 700-01756
Canon City, CO 81212

William Morris, Asst. A.G.
1525 Sherman Street, 3rd Fl.
Denver, CO 80203

Supreme Court
State of Colorado
Certified to be a true, true and correct copy

MAR 15 1982

DAVID W. BREENA
Court Clerk of the Supreme Court
Seal By Linda L. Maas
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF COLORADO

NO. 80SA517

THE PEOPLE OF THE STATE OF COLORADO,	)	
Plaintiff-Appellee,	)	
v.	)	February 15, 1982
RICHARD VELASQUEZ,	)	
Defendant-Appellant.	)	

Appeal from the District Court

of the

County of Montrose

Honorable Jerry D. Lincoln, Judge

EN BANC JUDGMENT AFFIRMED

J. D. MacFarlane, Attorney General
Richard F. Hennessey, Deputy Attorney General
Mary J. Mullarkey, Solicitor General
William Morris, Assistant Attorney General
Denver, Colorado

Attorneys for Plaintiff-Appellee

Jeffrey A. Springer
Denver, Colorado

Attorney for Defendant-Appellant

Richard Velasquez
Montrose, Colorado

Pro Se

JUSTICE QUINN delivered the opinion of the Court.

The defendant, Richard Velasquez, was convicted by a jury of four counts charging him with dispensing a dangerous drug, cannabis;[1] possession of narcotic drugs, namely morphine and codeine;[2] possession of more than one ounce of cannabis;[3] and carrying a concealed weapon.[4] His challenges on this appeal are several and include the claimed unconstitutionality of consensual electronic surveillance under Article II, Section 7, of the Colorado Constitution, the asserted illegality of his arrest and search incident thereto as well as a subsequent search of his automobile, the alleged violation of his statutory and constitutional rights to speedy trial, and a claim that he was denied effective assistance of counsel.[5] We affirm the judgment.

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1 Sections 12-22-404(1)(a) and 12-22-412(1), C.R.S. 1973 (1978 Repl. Vol. 5).

2 Sections 12-22-302 and 12-22-322, C.R.S. 1973 (1978 Repl. Vol. 5).

3 Sections 12-22-404(1) and 12-22-412(6) and (12)(d), C.R.S. 1973 (1978 Repl. Vol. 5).

4 Section 18-12-105(1), C.R.S. 1973 (1978 Repl. Vol. 8).

5 The defendant raises several other issues which we summarily dispose of here. First, the defendant raises an issue concerning his bail. Bail was originally set at $5,000 but was increased to $25,000 by the trial court shortly after a preliminary hearing. The proper method of contesting the reasonableness of bail is by an original proceeding to this court, Balltrip v. People, 157 Colo. 108, 401 P.2d 259 (1965), or by a petition pursuant to section 16-4-204(1), C.R.S. 1973 (1978 Repl. Vol. 8) and Crim. P. 46(c)(1) to review a bail increase. The defendant sought no such relief in this case and the issue of preconviction bail is therefore moot.

The defendant also claims that the search of his residence pursuant to warrant was illegal. The district attorney stated at a suppression hearing that no items seized from the defendant's home would be introduced at trial. The defendant acceded to this statement and made no request to suppress the fruits of the house search. At trial the prosecution did not offer into evidence anything obtained from the house search. Although the issue relating to the house search would appear to be moot, we have (Continued)

I.

The charges against the defendant arose from a drug transaction which occurred in Montrose County, Colorado, on December 22, 1978. Earlier that month, while working with the Colorado Bureau of Investigation as an informant, James Walsh met the defendant and purchased marijuana from him on three or four occasions prior to the events here at issue. On December 21 the defendant agreed to sell Walsh one pound of "sesamian marijuana" for $1300. The sale was scheduled for the next day at Walsh's room in the Will Rogers Motel in Montrose County. Walsh contacted Detective Sellers of the Montrose Police Department and received $1300 in recorded bills to make the purchase. During the morning hours of December 22 Detective Sellers and Agent Konkel of the Colorado Bureau of Investigation (CBI) placed an audio transmitter, with Walsh's consent, behind the headboard of the bed in his room. After Sellers and Konkel had stationed themselves in a car outside the motel, they saw the defendant arrive at about 1:00 p.m. in a Chevrolet automobile which he parked in the motel parking lot. The defendant then entered Walsh's room.

The officers monitored the ensuing conversation between the defendant and Walsh. When the defendant arrived he

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5 (Continued)
nonetheless reviewed the affidavit filed in connection with the application to search the defendant's home and are satisfied that there was probable cause for the issuance of the warrant.

The defendant also seeks resentencing under the 1979 version of H.B. 1589. The offenses charged in this case were committed prior to July 1, 1979, the effective date of H.B. 1589. Colo. Sess. Laws 1979, ch. 157, sec. 25 at 672. Due to the many times we have held that H.B. 1589 is not retroactive in its application, we reject the defendant's contention without further discussion. E.g., People v. Francis, ____ Colo. ____, 630 P.2d 82, n. 1 (1981).

told Walsh that he had no "sesamian pot" but he had brought two pounds of Columbian marijuana with him and, if Walsh purchased this marijuana, the defendant then would have enough money to purchase the "sesamian marijuana" for a later sale to Walsh. Walsh agreed to the purchase of the Columbian marijuana for $750. The officers saw the defendant leave the motel room and go to his car, where he removed a box and brown bag from the trunk, and then return to the room. Once back inside the room, the defendant weighed two bags of marijuana and Walsh paid him $750. After Walsh gave a prearranged signal by stating "this would make a nice Christmas present", the officers entered the room and arrested the defendant.

The officers recovered a .38 caliber loaded revolver from the defendant and a large sum of money, including the recorded money paid by Walsh. Seized from a coffee table in the room were a scale and a pound bag of marijuana. Another pound of marijuana was located in a paper sack on the floor. Immediately after the defendant's arrest the officers arranged for the towing of his automobile from the motel parking lot to a garage where the automobile was sealed. Later a warrant was issued for the search of the vehicle, based upon an affidavit of Detective Sellers reciting what Sellers and Agent Konkel heard and saw during the electronic surveillance and their arrest of the defendant and recovery of contraband in the motel room. Upon execution of the warrant a sawed-off shotgun, some small bags of marijuana and a trace of a black substance later determined to contain morphine and codeine were recovered from the defendant's vehicle.

A complaint was filed against the defendant in county court on January 3, 1979, and after a preliminary hearing the

matter was bound over to the district court. The defendant initially appeared in the district court with a deputy public defender on March 8, 1979 for arraignment. Defense counsel requested 30 days to file motions directed to the information prior to the entry of a plea. The court granted this motion but reserved September 17, 1979, for trial of the case. The trial date was selected after defense counsel acknowledged on the record that the six month speedy trial period would not begin to run until the arraignment and after he had rejected an earlier date due to a prearranged vacation.

Several days after the March 8 appearance the court ordered $1,920 in unmarked money previously seized from the defendant returned to him and granted him 30 days to retain private counsel. During the next three months the court granted several requests by the defendant for additional time to retain private counsel and to file motions. Ultimately the defendant retained a private attorney, who formally entered his appearance on July 23, 1979. This attorney filed various motions, including a motion to suppress various articles seized from the defendant, the motel room and the defendant's vehicle.

A hearing was held on the motion to suppress on August 27, 1979. The court denied the motion to suppress, ruling that Article II, Section 7 of the Colorado Constitution did not require a warrant to electronically monitor a conversation when one of the participants had consented to the monitoring, that the officers had probable cause and legal authority to arrest the defendant and search his person incident to the arrest, that the seizure of the defendant's vehicle was proper, and that the affidavit in support of the warrant to search the

vehicle established probable cause. The case was continued for trial commencing on September 17, 1979.

Although neither the defendant nor his attorneys ever sought to enter a not guilty plea subsequent to March 8, 1979, the defendant appeared with private counsel on the trial date and moved for dismissal of the charges on the basis that his right to a speedy trial had been violated. The court denied the motion to dismiss and, upon the defendant's refusal to enter a plea to the charges, entered a not guilty plea on his behalf pursuant to Crim. P. 11(d) and the trial commenced.

At trial, no recording or transcript of the monitored conversation between the defendant and Walsh was offered into evidence but Detective Sellers and Agent Konkel testified to the substance of what they had overheard while monitoring the conversation. The court admitted into evidence the marijuana, drug paraphernalia, recorded money and revolver seized during the course of the defendant's arrest as well as the other drugs and shotgun recovered from the defendant's vehicle. The jury found the defendant guilty of the felonies of dispensing a dangerous drug and possession of a narcotic drug, and guilty of the misdemeanors of possession and use of more than one ounce of cannabis and carrying a concealed weapon. Subsequently the defendant was sentenced on the felony convictions to concurrent terms of six to ten years and to concurrent terms of one year on the misdemeanor convictions. This appeal followed.

II.

The defendant argues that the state constitutional prohibition against unreasonable searches and seizures, Colo.

Const. Art. II, Sec. 7,[6] should be construed to require a warrant for the electronic transmission and monitoring of a defendant's conversations with another, in spite of the other party's consent to the electronic surveillance. The defendant concedes that under United States v. White, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971), no warrant is required for consensual electronic surveillance under federal constitutional standards. He urges us, however, not to follow White because its reasoning conflicts with realistic expectations of privacy.[7] We are not persuaded by his argument.

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6 Article II, Section 7, of the Colorado Constitution provides:

> "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing."

7 As a preliminary matter the defendant urges that White is inapplicable to this case because it was based in part on the non-retroactivity of Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), and, therefore, the post-Katz participant monitoring in this case is subject to the strictures of Katz. Subsequent to the White decision, however, the Supreme Court has made clear that White's rationale does apply to post-Katz consensual electronic surveillance. United States v. Caceres, 440 U.S. 741, 99 S. Ct. 1465, 59 L. Ed. 2d 733 (1979) (violation of IRS regulation prohibiting electronic monitoring without advance authorization from Attorney General does not raise "any constitutional questions"). Besides, as White pointed out,

> "Katz involved no revelation to the Government by a party to conversations with the defendant nor did the Court indicate in any way that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police." 401 U.S. at 749, 91 S. Ct. at 1124-25, 28 L. Ed. 2d at 457.

In White the United States Supreme Court reasoned that the use by government agents of electronic equipment to transmit and monitor the defendant's conversations with an informer, without a search warrant but with the informer's knowledge and consent, did not violate the Fourth Amendment to the United States Constitution:

> "Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights.... For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person ... (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency.... If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks." 401 U.S. at 751, 91 S. Ct. at 1125, 28 L. Ed. 2d at 458.

The protections of Article II, Section 7, of the Colorado Constitution, like its federal counterpart, are limited by reasonable expectations of privacy — that is, expectations which the law is prepared to recognize as legitimate. See People v. Gomez, ____ Colo. ____, 632 P.2d 586 (1981); People v. Becker, 188 Colo. 160, 533 P.2d 494 (1975). In determining the measure of constitutional protection under the warrant requirement of the Colorado Constitution, the proper

inquiry is not whether an individual defendant subjectively expected his ostensible accomplice in crime to preserve the confidentiality of their encounter and conversation. Rather, the proper inquiry is whether the defendant's expectation of confidentiality was constitutionally justified. Certainly, when a defendant meets with a police informant, whose role as such is concealed, in the informant's motel room for the purpose of selling him illegal drugs, such defendant has no legitimate expectation that his encounter and conversation with the informant may not later be used as evidence against him. If the law affords the defendant no legitimate expectation of privacy under these circumstances, neither should it protect him when the same informant permits the electronic recording and transmission of the same conversation taking place in the informant's room.

We recognize that United States v. White, supra, a plurality opinion, has not met with universal acceptance by state courts in determining the propriety of consensual electronic surveillance under state constitutional provisions.[8]

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[8] Some of the state decisions following White involved challenges to consensual electronic surveillance under a state constitutional prohibition of unreasonable searches and seizures, e.g., Hammond v. State, 354 So. 2d 280 (Ala. Crim. App. 1977); State v. Boone, 581 P.2d 571 (Utah 1978), while others dealt with challenges under a specific privacy guarantee under the state constitution, e.g., Franco v. State, 376 So. 2d 1168 (Fla. App. 1979) (specific Florida constitutional prohibition of unreasonable interception of private communications by any means); People v. Mosley, 63 Ill. App. 3d 437, 379 N.E.2d 1240 (1978) (specific Illinois constitutional prohibition of interception of communications by eavesdropping devices or other means). Most courts which have departed from White have done so on the basis of a provision in the state constitution specifically guaranteeing a right of privacy. See, e.g., State v. Glass, 583 P.2d 872 (Alaska 1978) (constitutional amendment to Alaska Constitution providing that right of privacy shall not be infringed and also state constitutional prohibition of unreasonable searches and seizures); White v. Davis, 13 Cal. 3d 757, (Continued)

However, we have relied upon White in several cases involving suppression issues. For example, in People v. Morton, 189 Colo. 198, 539 P.2d 1255 (1975), cert. denied 423 U.S. 1053, 96 S. Ct. 783, 46 L. Ed. 2d 642 (1976), we held that the warrantless electronic recording by a private investigator, working with the police, of the defendant's conversation with the investigator in the latter's automobile did not violate the defendant's Fourth Amendment rights, nor did the recording constitute an "unlawful interception" entitling the defendant to suppression under section 16-15-101 et seq., C.R.S. 1973 (1978 Repl. Vol. 8), which deals with wiretapping and eavesdropping. Again relying on White, we held in People v. Edmonds, 195 Colo. 358, 578 P.2d 655 (1978), that a defendant who connected his own telephone to his apartment manager's telephone line, to which the police thereafter connected a tape recorder with the manager's consent, did not have a "valid expectation of privacy while speaking on his extension of the manager's line." 195 Colo. at 365, 578 P.2d at 661.

Although neither Morton nor Edmonds involved a construction of our state constitutional guarantee against unreasonable searches and seizures, we see no reason to depart from White's rationale in the context of the specific facts of this

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8 (Continued)
533 P.2d 222, 120 Cal. Rptr. 94 (1975) (right of privacy amendment to California constitution); Tollett v. State, 272 So. 2d 490 (Fla. 1973) (Florida constitutional prohibition of unreasonable interception of private communications by any means); State v. Brackman, 178 Mont. 105, 582 P.2d 1216 (1978) (Montana constitutional provision stating that the right of privacy "shall not be infringed without the showing of a compelling state interest"). In People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975), which involved participant electronic monitoring in the defendant's home, the Michigan Supreme Court declined to follow White in its interpretation of its state constitutional protection against unreasonable searches and seizures.

case. Accordingly, we hold that the warrantless electronic transmission and monitoring of conversations taking place between a suspect and a police informant in the informant's motel room, when the informant has previously consented to the electronic surveillance, does not violate Article II, Section 7, of the Colorado Constitution.

III.

The defendant next argues that his arrest constituted an unreasonable seizure of his person under the United States and Colorado Constitutions because it was effected by a Montrose police officer outside the Montrose city limits, there was not probable cause for the arrest, and the arrest was made without a warrant. We reject these claims.

The record reflects that CBI Agent Konkel, who had statewide power of arrest, was both present and principally responsible for making the arrest. Also, it is undisputed that Detective Sellers, a Montrose city police officer, had been specially deputized as a county sheriff. These facts, by themselves, answer the defendant's claim with respect to the arrest powers of the officers who took him into custody. People v. Schultz, ___ Colo. ___, 611 P.2d 977 (1980); see also People v. Wolf, ___ Colo. ___, 635 P.2d 213 (1981).

Probable cause also existed for the defendant's arrest. In fact, during the suppression hearing the defendant with good reason conceded there was probable cause for his arrest. The arresting officers were both eye-witnesses and ear-witnesses to the criminal conduct of the defendant immediately prior to taking him into custody. E.g., Hill v. California, 401 U.S. 797, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971); People v. Chavez, ___ Colo. ___, 632 P.2d 574 (1981); People v. Johnson, 199 Colo. 68, 605 P.2d 46 (1980).

The defendant's claim that his warrantless arrest was constitutionally infirm is similarly without merit. There is no constitutional requirement for an arrest warrant when, as here, the arrest is effected in the motel room of another during the perpetration of a crime. See, e.g., United States v. Watson, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976); People v. Burns, ____ Colo. ____, 615 P.2d 686 (1980).

IV.

Next the defendant claims that the seizure of his automobile upon his arrest and the subsequent vehicular search pursuant to warrant violated the federal and state prohibitions against all unreasonable searches and seizures. We find no such constitutional violation in this case.

Due to its mobility, the opportunity to search an automobile is fleeting. If an effective search is to be made, either the vehicle must be immediately searched without a warrant or the car itself must be seized and held for whatever period is necessary to obtain a warrant.

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." Chambers v. Maroney, 399 U.S. 42, 52, 90 S. Ct. 1975, 1981-82, 26 L. Ed. 2d 419, 428 (1970).

The location of the vehicle in a motel parking lot, rather than a public street, does not affect the legality of the initial seizure. As long as there was probable cause to search the vehicle, public access to the parking lot created a sufficient exigency to permit the immediate seizure of the vehicle under the automobile exception to the warrant requirement. See, e.g., Cardwell v. Lewis, 417 U.S. 583, 94 S. Ct.

2464, 41 L. Ed. 2d 325 (1974); United States v. Matthews, 615 F.2d 1279 (10th Cir. 1980); People v. Meyer, ____ Colo. ____, 628 P.2d 103 (1981).

That probable cause existed to search the vehicle is evident from what the arresting officers saw and heard immediately prior to the arrest. In particular, the defendant's offer to sell two pounds of Columbian marijuana to Walsh, his exit from Walsh's motel room, his removal of a box and a brown paper bag from the trunk of his vehicle, his return to Walsh's motel room to complete the drug sale, and the seizure of the illegal drugs upon the defendant's ensuing arrest in the motel room, were first-hand observations which in their totality provided the officers with probable cause to believe that the defendant's vehicle contained illegal drugs. Thus, these facts justified the immediate seizure of the vehicle and, upon their incorporation in the affidavit, sufficiently established probable cause for the issuance of the search warrant.[9]

V.

We next consider the defendant's claim that he was denied his statutory and constitutional rights to a speedy

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[9] Although not raised before the trial court, the defendant for the first time asserts that the affidavit for the search warrant was technically insufficient because of the initial clause which stated: "Charles Sellers, an Investigator for the Montrose Police Dept. affiant, now appears before the undersigned _____, authorized to issue warrants in criminal cases...." The defendant argues that due to the blank lines appearing after the word "undersigned" the identity of the office of the person before whom the affiant appeared was not established by the affidavit. There is no merit to this argument. The affiant signed the affidavit and his signature was subscribed and sworn to before Richard J. Brown, who acknowledged the affiant's signature by signing the affidavit and by expressly identifying his office as Judge of the Montrose County Court, Montrose, Colorado.

trial. Section 18-1-405(1), C.R.S. 1973 (1978 Repl. Vol. 8) provides that if a defendant is not brought to trial "within six months from the date of the entry of a plea of not guilty, he shall be discharged from custody ... and ... the pending charges shall be dismissed ...." See also Crim. P. 48(b)(1). If a defendant intends to seek the benefit of this six month period, it is incumbent upon him to enter a plea of not guilty so that the period of limitation may commence. Saiz v. District Court, 189 Colo. 555, 542 P.2d 1293 (1975). A review of this record demonstrates that at no time prior to trial did the defendant or his attorneys ever seek to enter a plea of not guilty and activate the statutory speedy trial period.

When the defendant appeared in court on March 8, 1979, for arraignment, the court acceded to his attorney's request to postpone the entry of a not guilty plea for 30 days in order to permit the filing of motions under Crim. P. 12(b). Defense counsel on this occasion expressly acknowledged on the record in the presence of the defendant that the six month speedy trial period would not begin to run until a plea of not guilty had been entered. After offering the defendant an earlier trial date in August 1979, which was rejected due to the defense attorney's vacation plans, the court reserved a trial date of September 17, 1979, with the understanding that the arraignment would take place in due course. However, in spite of several court appearances, neither the defendant, his public defender, nor his retained attorney ever sought arraignment during the course of the proceedings subsequent to March 8, 1979. Thus, when the defendant requested a dismissal of the case on September 17, 1979, the six month

period had not yet begun to run. Saiz v. District Court, supra; People v. Romero, 196 Colo. 520, 587 P.2d 789 (1978).[10]

Nor do we find any violation of the defendant's rights under the Sixth Amendment to the United States Constitution and Article II, Section 16, of the Colorado Constitution. The constitutional right to a speedy trial attaches when a defendant is formally accused by a charging document, such as a criminal complaint, information or indictment, United States v. Marion, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); and the burden of proving a violation of that right is on the defendant. People v. Small, ___ Colo. ____, 631 P.2d 148 (1981); Gelfand v. People, 196 Colo. 487, 586 P.2d 1331 (1978). Whether a defendant's speedy trial right was violated is determined by an ad hoc balancing of four factors: the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); People v. Small, supra.

In this case the period intervening between the initial filing of a criminal complaint in the county court on January 3, 1979, and the trial on September 17, 1979, was neither excessive nor unjustified. Nor does the record disclose any assertion of the defendant's constitutional right to

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[10] Furthermore, the period of delay in arraignment from March 8, 1979, to July 23, 1979, when the defendant's privately retained attorney entered his appearance, was caused by or created at the instance of the defendant who subsequent to March 8 requested and received several continuances to retain private counsel and to file motions. Under such circumstances the period from March 8 to July 23 may not properly be assessed against the statutory speedy trial limitation. Saiz v. District Court.

a speedy trial prior to the trial date itself. Rather, the record strongly suggests that the defendant "hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges" without, however, really wanting to be tried. Barker v. Wingo, supra, 407 U.S. at 535, 92 S. Ct. at 2194, 33 L. Ed. 2d at 119. Finally, the defendant has failed to establish that his defense to the charges was in any manner prejudiced by the period intervening between the filing of the complaint and the trial date. The defendant's speedy trial claims are simply without merit.

VI.

The defendant's final contention is that he was denied effective assistance of counsel, U.S. Const. Amend. VI; Colo. Const. Art. II, Sec. 6, because he was not able to hire an attorney until July 1979, thus leaving his attorney with insufficient time to prepare for trial. A defendant is not constitutionally entitled to errorless counsel but rather to reasonably effective assistance of counsel. People v. White, 182 Colo. 417, 514 P.2d 69 (1973); People v. Gonzales, 37 Colo. App. 8, 543 P.2d 72 (1975). In determining whether an accused has been denied his constitutional entitlement, a reviewing court must consider all the attendant circumstances underlying the entire course of proceedings and then determine whether there was a denial of fundamental fairness. See, e.g., People v. Moody, ___ Colo. ___, 630 P.2d 74 (1981); People v. White, supra. A review of the record in this case does not support the defendant's claim.

Upon his formal entry of appearance on July 23, 1979, the defendant's attorney filed a motion for discovery which the district attorney confessed and a motion to suppress which

was vigorously argued on August 27, 1979. Additionally, defense counsel ordered and received a transcript of the preliminary hearing more than a month prior to trial. The record of the trial reveals that defense counsel thoroughly cross-examined the prosecution's witnesses, made numerous evidentiary objections throughout the trial, successfully argued a motion for a judgment of acquittal on the charge of possession of a narcotic drug for sale, section 12-22-322 (1)(a), C.R.S. 1973 (1978 Repl. Vol. 5), and presented an adroit summation to the jury in the face of overwhelming evidence of guilt. Such representation could not have been given without extensive preparation prior to trial. There is not even a suggestion in the record that the defense counsel's representation was anything less than competent.

The judgment is affirmed.

FILED
JUNE 10, 1982
(confirmed by tel.

IN THE SUPREME COURT OF THE STATE OF COLORADO

CASE NO. 80SA517

APPEAL FROM THE DISTRICT COURT, MONTROSE COUNTY, STATE OF COLORADO 79CR11

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

vs.

RICHARD VELASQUEZ,

Defendant-Appellant.

Notice is hereby given that Richard Velasquez, the Defendant-Appellant and herein after referred to as Appellant, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Colorado of February 16, 1982, rehearing denied March 15, 1982 (affirming the judgment of conviction), entered on March 19, 1982.

This appeal is taken pursuant to 28 USCA §1257 and Supreme Court of the United States of America Rules 10-15 and 53.

Appellant was convicted on September 18, 1979 in Montrose District Court, Montrose County, State of Colorado of the crimes of, Count I: Dispense dangerous drug (F) in violation of 12-22-404 (1) (a), C.R.S. 1973, as amended in 1978; Count II: Possess more than oz. cannabis (M) in violation of 12-22-404 (1) (L), C.R.S. 1973, as amended 1978; Count IV: Carry concealed firearm (M-2) in violation of 18-12-105 (1) (b), C.R.S. 1973, as amended 1978; Count V: Possession of a narcotic drug (F) in violation of 12-22-302, C.R.S. 1973, as amended 1978, was sentenced on October 10, 1979 to a minimum of six (6) years and maximum of ten (10) years at the Colorado State Penitentiary on Count I; one year (1) in Montrose County Jail on Count II; one year (1) in Montrose County Jail on Count IV; a minimum of six (6) years and maximum of ten (10) years to the Colorado State Penitentiary on Count V, all terms to run concurrently. Appellant is presently confined at the Colorado Department of Corrections at Canon City, Colorado at the Shadow Mountain Facility.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The entire record that was included in the transcript of the record on

appeal to the Supreme Court of Colorado. This includes all briefs, motions, judgments and orders entered by Appellant, Appellant's former attorney, and the Appellate courts in the above captioned cause.

2. The entire record of the transcript of the record on file with the District Court of Montrose, Montrose County, State of Colorado. This includes all original process and pleadings on file in the trial court, including all judgments and orders of the court, all exhibits, the reporter's original transcript of trial, motion to suppress, arraignment and all other hearings held in the court below. This is necessary to properly review the issue of ineffective assistance of counsel.

3. The entire record of the hearing held in the Supreme Court of Colorado on February 16, 1982 and the entire record of all subsequent proceedings held in this case. This includes a copy of the Opinion of the Court; a copy of Appellant's Letter to the Court and Motions dated February 16, 1982; Appellant's Petition For Rehearing Pursuant to C.A.R. 40 and accompanying motions dated March 2, 1982; Appellant's Petition For Rehearing Pursuant to C.A.R. 40 and accompaning motions dated March 22, 1982; the letter written to the Honorable Paul V. Hodges, Chief Justice of the Supreme Court of Colorado, dated April 13, 1982 and the Motion For Advisory Counsel dated April 13, 1982. The letter written to Honorable Paul V. Hodges was accompanied by the Petition and motions of March 22, 1982 as those papers were sent back to Appellant rather than being filed in the Court. The Montoya brief, NO. 80CA1257 is to be included in the record also and was previously submitted with the Petition of March 22, 1982. All judgments and orders of the Supreme Court of Colorado concerning this case are also to be included in the record and all transcripts of all hearings held by such court concerning this matter.

3. All briefs, motions and pleadings of whatever nature that the prosecution has filed with the courts concerning this case.

III. The following questions are presented by this appeal:

Appellant has decided to change the order of the listing of his points of error and list them in order of merit rather than as they were previously raised. This will be further explained in Appellant's Jurisdictional Statement. Appellant has also discovered that some of his previous arguments were actually several arguments rather than one and thus Appellant will number the main arguments, there were seven (7) original arguments, and letter the other arguments with a small letter in parenthesis. This way the arguments relating to

the same issue will be grouped together under one main heading.

1. That due to irreconcilable differences between Appellant and his attorney and the fact that Appellant's Attorney refused to appeal many of the issues that had been raised during the trial and pretrial proceedings and that had been previouly discussed as being meritorious and which would be part of Appellant's appeal, Appellant decided to proceed Pro Se and entered these arguments pursuant to the "deliberate by-pass rule" as stated in Fay v. Noia and "cause" and "actual prejudice" as stated in Wainwright v. Sykes. Appellant also had many disagreements with his attorney concerning the handling of every aspect of this case. This is particularly true of the fact that no continuance was requested of the trial despite the fact that Appellant's attorney had no defense prepared and this is particularly evident from his closing argument. Thus it was error for the Supreme Court of Colorado not to grant relief on the original issues; to summarily dispose of some of Appellant's arguments; and not to grant relief or a limited remand to the trial court on the issues that Appellant requested a Limited Remand to the trial court for. All the issues presented by appellant are meritorious and are plain error and thus relief should have been granted on all issues and a new trial or dismissal of all charges should have been granted.

2. That the Court erred in ruling that the seizure and later search of Appellant's vehicle were incident to arrest because:

(a). Appellant was not arrested in the vehicle but in the motel room. Only the search and seizure conducted inside the motel room was incident to arrest.

(b). The arrest in the motel and seizure of the evidence therein did not provide probable cause to seize and search Appellant's vehicle. Nothing said or done before, during or after the arrest provided probable cause to seize the vehicle or search it. There were also no exigent circumstances requiring immediate seizure of the vehicle.

(c). The vehicle was parked on private property and thus not subject to seizure for any reason. No warrant of forfeiture; no violation of law; and no request by Appellant or anyone else was ever presented to warrant this seizure and later search.

(d). The seizure and search of Appellant's vehicle was also not incident to arrest as it was not a search for evidence of the crime for which Appellant was arrested. The search was a search for evidence of a different crime other than the alleged sale in the motel room and any evidence found could

not properly be used to support the crime of alleged sale in the motel room. Thus the statements in the affidavit describing the sale do not support a probable cause finding to seize and search Appellant's car.

(c). That the vehicle was impounded, towed to a garage and sealed by the police and later searched pursuant to a search warrant and thus the search was not incident to arrest but must depend on the sufficiency of the search warrant and affidavit. The Appellant had been arrested and handcuffed inside the motel room and taken from there to jail and incarcerated and thus had no access to the vehicle or its contents at any time.

2A. That the court erred in ruling that the search warrant and affidavit are sufficient and provided probable cause as the warrant and affidavit are fatally defective for the following reasons:

(a). No probable cause to search the vehicle was presented in the warrant. There was only possible probable cause to search Appellant's home. Nothing was written in the warrant nor was there any affirmation that provided probable cause to search the vehicle. In fact the affiant stated at the suppression hearing that he had no probable cause to suspect contraband was in the vehicle. The affidavit contained no underlying facts and circumstances on which the affiant based his conclusions that a further quantity of dangerous drugs and/or traces of marijuana were located in Appellant's car. There was no statement of any kind of personal knowledge or sighting by the affiant, the informant, or anyone else of any contraband ever being in the vehicle. Thus the search of the car was an exploratory search.

(b). The search of the suitcases and other containers was illegal as it was done without a warrant and without probable cause.

(c). The warrant and affidavit was also fatally defective by the use of the word "may" by the affiant in the phrase, "a further quantity of dangerous drugs and/or traces of marijuana <u>may</u> be located in the above described car", as this further provides proof that the search was exploratory and that the affiant had no probable cause to search but was simply guessing as to what he would find.

(d). That the use of the words "dangerous drugs" and "marijuana" also made the warrant and affidavit fatally defective and further proved the search to be exploratory. The words "dangerous drugs" are vague and could mean any number of various drugs. The only type of drug mentioned in the affidavit was marijuana and is the only drug that probable cause, if any, could be found for. The warrant and affidavit stated "traces of marijuana" and none were found or

searched for. Only the containers were searched. Thus the warrant and affidavit failed to particularly describe the place to be searched or the things to be searched for and seized.

(e). The warrant and affidavit are also fatally defective in that the blanks are not properly filled in. The space in the affidavit, for the car search, was not filled in which states who the affiant appeared before and who is authorized to issue warrants in criminal cases. It also fails to state where the car is located. The search warrant also fails to state which Judge of what court signed the warrant.

(f). That the alleged search for traces of marijuana was illegal as not based on probable cause and it was a search for something that is not a crime.

Thus the Court should have remanded this case for a new trial suppressing all evidence found in the car search or in the alternative dismissed the charges.

3. That the Court erred in ruling that the record shows that Appellant was represented by effective assistance of counsel at all stages of the proceedings. The record plainly shows that Appellant was ineffectively represented by counsel in all stages of the proceedings for the following reasons:

(a). The most obvious example of Appellant's Attorney's incompetance appears in his closing argument at trial. It also shows his lack of preparation of a proper defense. He repeatedly made derogatory comments concerning Appellant and stated that Appellant was guilty and of bad character among other comments. He in effect entered a plea of guilty for Appellant which is improper as only the defendant can enter a plea of guilt on his behalf.

(b). The Court also erred in dismissing the public defender from the case as Appellant was indigent and was thus deprived of assistance of counsel. The money returned to Appellant was not sufficient justification to require that Appellant hire his own attorney. The amount involved was not sufficient to allow Appellant to make bail or to hire an attorney let alone both and thus the public defender should have been kept on at least until Appellant could get an attorney on his own.

(c). The attorney that Appellant finally did hire did not have sufficient time to investigate all possible errors pertaining to this case and which could have been raised in the pretrial proceedings and he did not have time to properly prepare for trial. Thus he should have requested a continuance of the trial. He also did not perfect a proper appeal of all the errors that he had raised in the pretrial proceedings, trial proceedings and motion for new trial.

(d). The poor performance of Appellant's attorney is also demonstrated by his failure to raise all the issues that he should have. There were also many issues pertaining to the issues that he did raise which should have been raised and could have by any experienced attorney, which Appellant's attorney was, as they are all basic issues which are plainly stated in the law books. This is particularly true since Appellant did not have much problem finding these errors and he had no previous legal experience.

(e). Other errors which Appellant's attorney should have raised and appealed are:

(1). He failed to introduce the inaudible tape recording into evidence. His failure to analyze the tape recording was also incompetant. The tape recording would have proved to be exculpatory evidence for Appellant.

(2). He failed to adequately argue and investigate the circumstances surrounding the identification of the substance charged in Count V. The evidence was not sufficient to properly identify this substance as a narcotic. It was not properly identified at all. Even if it did contain morphine and codeine it could have possibly been a drug in Schedule III or V of the Schedule of Controlled Substances.

(3). That Appellant was convicted on Counts I and II in violation of the Constitutional proscriptions against double jeopardy. The same evidence was used to convict Appellant on both Counts.

(4). That the evidence was insufficient to warrant a conviction for sales in Count I. The evidence showed that Appellant never solicited or brought about a sale but showed that the informant was responsible for this. Thus Appellant was only guilty of possession for sale or simple possession if anything.

(5). That the Jury instructions were inadequate to properly advise the jury as to all the elements of the crimes charged in this case and thus plain error was also committed in this respect.

Thus the Court should have granted Appellant a new trial or in the alternative should have dismissed all charges.

4. That the Court erred in not sentencing Appellant under the presumptive range of the new sentencing bill, which became effective prior to Appellant's trial and prior to the time Appellant obtained counsel, for the following reasons:

(a). Defendants are entitled to the benefits of amendatory legislation which mitigates the penalty for crimes when the relief is sought before finality has attached to the judgment of conviction. Thus Appellant is entitled to be

sentenced under § 23 of the first version of H.B. 1589. However, if for some reason the Court rules that this is not so then Appellant is entitled to be sentenced under § 25 of the second version of H.B. 1589. Both became effective on the same date.

(b). That additional changes in the law at the 1981 Colorado Session of the General Assembly contain provisions which apply to Appellant and thus Appellant is also entitled to be sentenced under this amendatory legislation also and thus have his sentence reduced.

5. That the Court erred in ruling that Appellant had not been denied his Constitutional and Statutory right to a speedy trial for the following reasons:

(a). That the requirement that a plea be entered before the speedy trial time period begins is unconstitutional because it establishes a lower standard than is required by the Federal Constitution rather than a higher standard. It creates a standard whereby the Courts can intentionally bypass a defendant's speedy trial rights. It also creates a violation of equal protection between defendants who plead and those who do not.

(b). That Appellant was not properly advised by the court nor the public defender of his speedy trial rights.

(c). That the single continuance of more than six months violates Appellant's statutory right to a speedy trial as the Colorado statutes state that no single continuance shall exceed six months.

(d). That avoiding the speedy trial time period for the convenience of allowing the public defender a vacation is unconstitutional. The public defender should have been ordered to appear on the date available or new counsel should have been appointed.

(e). That it is not a requirement in Colorado that a defendant demand a speedy trial before he is entitled to the benefits of a speedy trial.

(f). That Appellant did not request any continuances of trial and no continuances were given in this case. Only additional time was given to obtain counsel. Thus this time cannot be excluded from the speedy trial time period.

(g). That a plea was actually entered for Appellant by the Court at arraignment, the date of trial setting, as a trial date should not be set until a plea has been entered. The Colorado statutes also contain a provision for the Court to enter a plea of not guilty should the defendant fail to plead. Thus a plea was actually entered at arraignment.

Thus all charges should have been dismissed against Appellant as his speedy trial rights were violated.

6. That the Court erred in ruling that the police had proper jurisdiction to conduct an investigation outside the city limits of Montrose and to also rule that they had jurisdiction to arrest Appellant for the following reasons:

(a). The Montrose City Police have no jurisdiction to conduct investigations nor effect arrests outside the city limits without a warrant.

(b). The Colorado Bureau of Investigations (CBI) did not conduct this investigation in conjunction with the Montrose Police Department. They only participated in an advisory capacity. The fact that they were present on the scene of the crime as witnesses and to effect the arrest is without merit as they were only there at the request of the Montrose Police Department as advisors only. Their presence was the result of the illegal investigation conducted by the Montrose Police Department and was effected without probable cause or a warrant of any kind.

(c). The fact that a Montrose City Police Officer had been specially deputized as a county sheriff is without merit. An Officer cannot be a City Police Officer and a Sheriff at the same time and no such provision is contained in either the Colorado Statutes or the Montrose City ordinances. In fact the Colorado Statutes state to the contrary.

Thus the investigation, arrest, and subsequent search and seizures conducted in this case should have been ruled illegal and all charges dismissed.

7. That the court erred in ruling that the warrantless electronic monitoring was not illegal for the following reasons:

(a) A warrant is required for all searches and seizures to be reasonable. The Court also failed to rule on the Federal Constitutional issue but only ruled on the Colorado Constitutional issue despite discussing Federal case law. This warrantless electronic participant monitoring violated the Federal Constitution as well as the Colorado Constitution. A warrant should have been obtained prior to the bug being placed in the room and prior to authorizing the agents to listen and record the conversation.

(b). The monitoring was illegal and unreasonable as the bug was placed in the room behind the headboard of the bed rather than on the person of the informant.

(c). It was error to allow the agents listening to the conversation from outside the motel and not introduce the tape recording itself. Without the tape recording all testimony pertaining to the conversation in the motel

room was not accurate. The statements by the informant concerning the prior alleged sales was vague, uncertain, and uncorroborated as was the rest of his testimony. The testimony of the agents was also vague, uncertain, and uncorroborated.

Thus this was an illegal warrantless participant electronic monitoring and all evidence should have been suppressed and all charges dismissed.

8. That the Court erred in not ruling that the errors presented to the court on appeal were in violation of both the Federal and State Constitutions. Appellant raised both Federal and State Constitutional arguments concerning all issues. It appears that the Court did not rule on the Federal question concerning the warrantless participant electronic monitoring however and is the reason Appellant added
^8. to this Notice of Appeal.

9. That the Court erred in not granting Appellant a Rehearing as Appellant was not notified when the hearing was to be and thus was not given the opportunity to present a supplemental or reply brief prior to the hearing and thus was deprived of a hearing pertaining to all the additional research that he had done between the time that he filed his Opening Brief, May 12, 1981, and the time of the hearing, February 15, 1982. The Court also misinterpreted some of the issues and also ruled contrary to some of the arguments than what was presented in the briefs.

10. That the Court erred in not granted a limited a remand to the trial court in order to present many of the new issues that Appellant had discovered in his research and that had not been raised below and thus all state remedies had not been exhausted. A remand should have been granted in order to allow Appellant to exhaust all remedies on all issues and thus be able to present all issues to the United States Supreme at the same time in the proper fashion.

DATED JUNE 7, 1982.

Respectfully Submitted

Richard Velasquez

Richard Velasquez, Pro Se #01756
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, Colorado 81212

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Notice of Appeal to The Supreme Court of the United States of America upon all parties herein by depositing copies of same in the United States mail, certified mail, at Shadow Mountain Correctional Facility, Canon City, Colorado this 7th day of June 1982, addressed as follows:

Clerk of the Supreme Court
State of Colorado
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Denver, CO 80203

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Hon. Jerry D. Lincoln, Judge
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P.O. Box 368
Montrose, CO 81401

Office of the Clerk
Supreme Court of the United States of America
1 First Street, N.E.
Washington, D.C. 20543

Richard Velasquez

Richard Velasquez, Pro Se #01756
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, CO 81212

81-647

DISM

STATE OF COLORADO, ss.

IN THE SUPREME COURT THEREOF.

THE PEOPLE OF THE STATE OF COLORADO,

To the District Court of Montrose County and State of Colorado, Greeting:

WHEREAS, lately in the District Court of Montrose County State aforesaid, in a certain cause therein pending between The People of the State of Colorado Plaintiff, and Richard Velasquez Defendant, the judgment of said District Court in said cause rendered was against the said Defendant

AND WHEREAS, the said cause was brought into our SUPREME COURT OF THE STATE OF COLORADO, from the Montrose County District Court.

AND WHEREAS, at the January Term of our Supreme Court, in the year of our Lord one thousand nine hundred and eighty-two, the said cause came on to be heard before our said SUPREME COURT on the 16th day of February, A. D. 1982, (the same being one of the Juridical days of said term) and the following proceedings were had and entered of record in said cause, to-wit:

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

No. 80SA517 vs.

RICHARD VELASQUEZ,

Defendant-Appellant.

Appeal, District Court, Montrose County; No. 79CR11

This cause having been brought to this court as an appeal from the District Court of Montrose County, and having been heretofore submitted to the consideration and judgment of the court, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED and adjudged that the judgment of said District Court shall be, and the same hereby is, Affirmed.

Now, Therefore, this cause is remanded to you, the said District Court, in and for the said Montrose County and State aforesaid, that such further proceedings may be had in said cause as shall conform to the judgment of this Court, entered as aforesaid, as also with the opinion filed therein.

WITNESS the HONORABLE PAUL V. HODGES Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City of Denver, this 19th day of March, A. D. 19 82.

DAVID W. BREZINA
Clerk Supreme Court.
By Linda L. Macias
Deputy.

Velasquez

RECEIVED
JUN 21 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES OF AMERICA

CASE NO.

SUPREME COURT OF COLORADO NO. 80SA517
DISTRICT COURT, MONTROSE COUNTY, STATE OF COLORADO, NO. 79CR11

LETTER TO THE COURT AND MOTIONS

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

vs.

RICHARD VELASQUEZ,

Defendant-Appellant.

Appellant is writing this letter to explain to the Court his difficulties in writing the Jurisdictional Statement and getting it mailed. Appellant did write to Hon. Justice Bryon R. White explaining some of these difficulties and requesting a continuance and advice on the precedures involved in filing paper in the Supreme Court of the United States of America.

One difficulty Appellant had is the fact that the Law Library at Shadow Mountain Correctional Facility in Canon City, Colorado, where Appellant is incarcerated, has not updated their library. The most recent Rules Appellant was able to rely on appeared in the 1981 Supplement issued in August of that year in Volume 17 of the Supreme Court Digest "Laywer's Edition". These Rules were Amended effective November 21, 1980. At first Appellant was confused he did not know what the proper method was to challenge the decision of the Supreme Court of Colorado, by Appeal, Certiorari, or Habeas Corpus. The bound Volume stated that Appellant had 90 days to Appeal or Petition For Certiorari while the Supplement stated that the time limit for Appeal is 90 days and 60 days for Certiorari. In the letter to Hon. Justice White Appellant requested a copy of the rules that are most current or advisory counsel and a continuance so that he would have time to properly prepare an Appeal or Petition whichever is proper in this case. This letter was dated May 5, 1982 and was never answered. Appellant also asked the Colorado Supreme Court for advise on this and for an advisory counsel but this was also denied. Appellant also asked other inmates concerning this but none had ever been to the Supreme Court of the United States of America and thus did not know but the ones that had studied law were divided as to whether an Appeal or Petition For Certiorari was proper. All the inmates did state that a Petition For Habeas Corpus was the proper method of appeal from the Supreme Court of Colorado as that is apparently the only method that is performed at this institution. Some did say that their lawyers had told them that a direct appeal to the Supreme Court of the United States of America was possible. Thus after reading the Rules and getting these different opinions Appellant decided to file for Appeal. Appellant also needed more time than 60 days

although he could have filed some sort of paper at that time. Appellant also needed more time due to the fact that he was uncertain when the date of his Petition For Rehearing to the Supreme Court of Colorado was denied. Appellant filed two such Petitions, one dated March 2, 1982 and one March 22, 1982. The first was denied March 15, 1982 and the second was stricken April 21, 1982. Appellant filed the second Petition because he had requested a continuance of the due date for such Petition, which was granted to March 24 1982, but did not receive the decision on this until after he had mailed the first one. Appellant had only received the Opinion of the Court about four days before he mailed the first Petition in and thus did not have sufficient time to prepare a proper Petition but sent one in so that he would not file late should his request for continuance be denied. The request for continuance was based on the fact that Appellant had not received the Opinion of the Court as yet. The continuance was granted and thus Appellant filed the second Petition which was more complete and which was stricken due to the fact that the first one had been denied. Thus Appellant lost this time and did not have enough time to properly prepare this Appeal to this Court. Appellant requests that the time period for this Appeal be considered to begin April 21, 1982 when the second Petition For Rehearing was Stricken rather than March 19, 1982 when the Judgment was entered.

Appellant has also encountered problems concerning getting copies of the Jurisdictional Statement made for the parties to this Appeal and having them mailed. Appellant had the staff at the institution copy part of this Statement while Appellant was preparing the rest of it so that it would be more convient to sort out the copies for mailing when the whole thing was finally finished. The copier is off the grounds and the inmates are required to give them to one of the officers who takes them and gets copies. Inmates are charged 15¢ a page for this to be taken off their accounts. The officers now refuse to make any more copies for Appellant as he is now around $45.00 in the red due to making copies of the Notice of Appeal and copies of the Jurisdictional Statement. They say Appellant cannot make any more copies until this is paid. Appellant was $5.33 in the red when he filed his Motion For Leave to Proceed in Forma Pauperis dated June 7, 1982. Since Appellant was going to court in Montrose, Colorado on the 16th of June he decided to get copies when he went there and send them from there and is the reason they were not sent earlier in the week when the Statement was ready. The Court in Montrose refused to make copies for Appellant also stating they are no longer parties to this. Thus Appellant has changed the date to June 17, 1982. Appellant got Mr. Roushar, an attorney representing Appellant in advisory capacity in Montrose, to make the copies and the Sheriff has agreed to mail them. Thus Appellant requests that they be allowed to be filed late for this reason also should they in fact be late. This last point is also an area Appellant is confused on. Rule 12 only states when a Notice of Appeal must be filed but does not state anything about when the Jurisdictional Statement must be filed and Appellant has not been able to locate the Rule stating the time limits for the Jurisdictional Statement and thus decided to send this one in now.

Appellant has had some difficulty in preparing this Jurisdictional Statement. Appellant has found, upon reviewing it, that he has left out copies of some of the relevant statutes. Since it is ready for mailing and Appellant is not being allowed to make copies or go to the Law Library to get copies of these to include with it at this time Appellant decided to send it anyway since he is uncertain of when it is due. Appellant also could not get anyone to go to the library and do this for him. the missing statutes are Colorado Revised Statutes, 12-22-301; 12-22-308; and Rule 35 of the Colorado Rules of Criminal Procedure. The Federal Statutes are 21 USCA 812 Schedule II and V; 28 USCA 1257. Thus Appellant requests the Court to issue an order stating that the institution is to allow Appellant to make copies of these to send to the Court and to be allowed to make copies of all court papers to be sent to the parties to the proceedings and to the Court and to be allowed to make a copy for himself. They said they must receive a Court Order before they will allow Appellant will be allowed to make any more copies. It is highly unlikely that Appellant will be able to pay for these as he only makes $25 a day at the institution.

Appellant also requests that he receive a copy of the new Rules pertinent to an Appeal to this Court. Appellant also request that Hon. Judge Lincoln and the Clerk of the District Court, Montrose County Courthouse, 300 So. First, Montrose, CO 81401 be stricken as parties to this proceeding as they have stated that they are not so. Appellant has decided not to present a copy of the Jurisdictional Statement to them for this reason but should the Court state otherwise Appellant will give them a copy. Should the Court decide that this Jurisdictional Statement is not in the proper form, Appellant requests that he be granted additional time in which to correct it and possibly have advisory counsel appointed. THANK YOU.

DATED JUNE 17, 1982.

Respectfully Submitted

Richard Velasquez

Richard Velasquez, #01756 Pro, Se
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, CO 81212

State of Colorado

MAR 8 1982

DAVID W. BREZINA
Court Clerk of the Supreme Court
Seal By [illegible]
Deputy Clerk

SUPREME COURT, STATE OF COLORADO

Case No. 80 SA 517

APPEAL FROM THE DISTRICT COURT, MONTROSE COUNTY, NO. 79CR11

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

vs.

RICHARD VELASQUEZ,

Defendant-Appellant.

Upon consideration of the Letter To The Court and Motions filed on February 24, 1982 and the Motion For Stay Pending Review on Certiorari filed by the Defendant-Appellant herein, and now being sufficiently advised in the premises,

It Is This Day Ordered that the request to reset this matter for oral argument shall be, and the same hereby is, Denied.

It Is Further Ordered that the Request for additional time within which to file a Petition for Rehearing shall be, and the same hereby is, Granted, and said Petition for Rehearing shall be filed on or before March 24, 1982.

It Is Further Ordered that mandate in this matter shall be, and the same hereby is, Stayed pending the filing of a Petition for Rehearing herein.

It Is Further Ordered that the request for appeal bond shall be, and the same hereby is, Denied.

It Is Further Ordered that all other requests as set forth in these pleadings shall be, and the same hereby are, Denied.

BY THE COURT, EN BANC, MARCH 4, 1982

cc: William Morris
Assistant Attorney General

Jeffrey A. Springer
1600 Broadway, #2300
Denver, CO 80202

Richard Velasquez
Box 700-01765-1-E-10
Canon City, CO 81212

Hon. Jerry D. Lincoln, Judge
Montrose County Courthouse
300 So. First
Montrose, CO 81401

Clerk of the District Court
Montrose County Courthouse
300 So. First
Montrose, CO 81401

SUPREME COURT, STATE OF COLORADO

Case No. 80 SA 517

APPEAL FROM THE DISTRICT COURT, MONTROSE COUNTY

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee,

vs.

RICHARD VELASQUEZ, Defendant-Appellant.

Upon consideration of the Motion to Reconsider Motion to Proceed In Forma Pauperis filed by the Defendant-Appellant, and now being sufficiently advised in the premises,

It Is This Day Ordered that the Motion to Proceed In Forma Pauperis shall be, and the same hereby is, Granted from this date forward only with no refund for past costs already paid.

BY THE COURT, EN BANC, FEBRUARY 11, 1981

cc: Richard Velasquez
P.O. Box 9
Montrose, CO 81401

Jeffrey A. Springer
1700 Broadway, #2304
Denver, CO 80290

William Morris
Assistant Attorney General

Supreme Court
State of Colorado
Certified to be a full, true and correct copy
FEB 11 1981
DAVID W. BREZINA
Court Clerk of the Supreme Court
Seal By K. Eldridge
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 80 SA 517

"THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee,	)	
vs.	)	Appeal from the District Court, Montrose County
RICHARD VELASQUEZ, Defendant-Appellant.	)	

Upon consideration of the various handwritten motions filed by the Defendant-Appellant herein on January 9, 1981, and now being sufficiently advised in the premises,

It Is This Day Ordered that the Defendant-Appellant's request to proceed without counsel shall be, and the same hereby is, Granted.

It Is Further Ordered that the Oral Argument presently set for January 16, 1981 at 1:30 P.M. shall be, and the same hereby is, Vacated.

It Is Further Ordered that Oral Argument shall be dispensed with in this matter.

It Is Further Ordered that the Defendant-Appellant herein shall have sixty(60) days or until March 16, 1981 within which to file a handwritten brief in support of appeal points.

It Is Further Ordered that the Plaintiff-Appellee shall have thirty(30) days from the filing of the above-referenced brief to file a reply brief.

It Is Further Ordered that the Defendant-Appellant shall be, and the same hereby is, Granted reasonable use of law books consistent with the security of the Sheriff's Department.

It Is Further Ordered that all other requests of the Defendant-Appellant shall be, and the same hereby are, Denied.

BY THE COURT, EN BANC, JANUARY 15, 1981

cc: Richard Velasquez

William Morris
Assistant Attorney General

Jeffrey A. Springer

Sherriff of Montrose County

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

JAN 19 1981

DAVID W. BREZINA
Court Clerk of the Supreme Court
Seal By K. Eldridge
Deputy Clerk

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

MAR 17 1981

DAVID W. BREZINA
Court Clerk of the Supreme Court
Seal By K. Eldridge
Deputy Clerk

SUPREME COURT, STATE OF COLORADO

Case No. 80 SA 517

APPEAL FROM THE DISTRICT COURT, MONTROSE COUNTY, NO. 79CR11

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee,

vs.

RICHARD VELASQUEZ, Defendant-Appellant.

Upon consideration of the Motion for Discovery of Transcripts and Court Records and the Motion for Extension of Time to File Brief, and now being sufficiently advised in the premises,

It Is This Day Ordered that the Motion for Extension of Time to File Brief shall be, and the same hereby is, Granted, and the Brief of the Defendant-Appellant Velasquez shall be filed on or before May 12, 1981.

It Is Further Ordered that the District Court of Montrose County shall release to the Defendant-Appellant Velasquez a copy of the search warrants and affidavits, the motion for new trial, the preliminary hearing transcript, the transcript of the jury selection, and the jury instructions. In all other respects, the Motion for Discovery of Transcripts and Court Records shall be, and the same hereby is, Denied.

It Is Further Ordered that the cost of the transcription of the jury instructions shall be born by the District Court of Montrose County.

It Is Further Ordered that the District Court of Montrose County shall cooperate fully in implementing this order and in supplying the copies of the above pleadings and transcripts on file therein.

BY THE COURT, EN BANC, MARCH 12, 1981

cc: William Norris
Assistant Attorney General

Jeffrey A. Springer
1700 Broadway, #2304
Denver, CO 80290

Richard Velasquez
P.O. Box 9
Montrose, CO 81401

Clerk of the District Court
Montrose County Courthouse
Montrose, CO 81401

DISTRICT COURT, MONTROSE COUNTY, STATE OF COLORADO

ACTION NO. 82 CR 2

AMENDED INFORMATION

PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

RICHARD VELASQUEZ,

Defendant.

The District Attorney for the Seventh Judicial District of the State of Colorado informs the Court that on or about December 1, 1981, in the County of Montrose, and State of Colorado,

Count I

RICHARD VELASQUEZ did unlawfully and feloniously possess marijuana concentrate (Hashish Oil);

against the peace and dignity of the People of the State of Colorado and in particular in violation of Section 18-18-106, C.R.S. 1973 (as amended) POSSESSION OF MARIJUANA CONCENTRATE (HASHISH OIL) (F-4)

Count II

RICHARD VELASQUEZ did unlawfully and feloniously possess more than one ounce of marijuana;

against the peace and dignity of the People of the State of Colorado and in particular in violation of Section 18-18-106, C.R.S. 1973 (as amended) POSSESSION OF MORE THAN ONE OUNCE OF MARIJUANA (F-4)

Count III

That on April 22, 1974, in the District Court for Boulder County, Twentieth Judicial District, State of Colorado, by and before the Honorable Rex Scott, then and there a Judge of said Court and competent authority in the premises, Richard Velasquez was duly and legally convicted of the crime of POSSESSION OF A NARCOTIC DRUG (COCAINE), in violation of Section 48-5-2, C.R.S. 1963 (as amended) SECOND DRUG CONVICTION (F-4)

Count IV

That on October 10, 1979, in the District Court for Montrose County, Seventh Judicial District, State of Colorado, by and before the Honorable Jerry D. Lincoln, District Judge, then and there a Judge of said Court and competent authority in the premises, Richard Velasquez was duly and legally convicted of the crimes of DISPENCING A DANGEROUR DRUG, POSSESSION OF MORE THAN ONE OUNCE OF CANNIBIS, AND POSSESSION OF A NARCOTIC DRUG, in violation of, respectively, Sections 12-22-404(1)(a), 12-22-404 (1)(1), and 12-22-302, C.R.S. 1973 (as amended). 18-18-106 SECOND DRUG CONVICTION (F-4)

Count V

That on the 22nd day of April, 1974, in the District Court of the State of Colorado, in and for the County of Boulder, by and before the Honorable Rex Scott, then and there a Judge of said Court and a competent authority in the premises, Defendant, Richard Velasquez, was duly and legally convicted of a felony, namely, POSSESSION OF A NARCOTIC DRUG (COCAINE), in violation of Section 48-5-2, C.R.S. 1963 (as amended) of the laws of said State of Colorado, and on the 22nd day of April, 1974, judgment of said conviction was duly entered and on said date said Defendant was duly sentenced to the Colorado State Reformatory, which sentence was duly executed;

against the peace and dignity of the People of the State of Colorado and in particular in violation of Section 16-13-101, C.R.S. 1973 (as amended) HABITUAL CRIMINAL

Count VI

That on the 10th day of October, 1979, in the District Court of the State of Colorado, in and for the County of Montrose, by and before the Honorable Jerry D. Lincoln, then and there a Judge of said Court and a competent authority in the premises, Defendant, Richard Velasquez, was duly and legally convicted of certain felonies, namely, DISPENSING A DANGEROUS DRUG and POSSESSION OF A NARCOTIC DRUG, in violation of, respectively, Sections 12-22-404(1)(a) and 12-22-302, C.R.S. 1973 (as amended), of the laws of said State of Colorado, and on the 10th day of October, 1979, judgment of said conviction was duly entered and on said date said Defendant was duly sentenced to the Colorado State Penitentiary, which sentence was duly executed;

against the peace and dignity of the People of the State of Colorado and in particular in violation of Section 16-13-101, C.R.S. 1973 (as amended) HABITUAL CRIMINAL

/s/
Michael H. Argall, No. 5640
Assistant District Attorney

CERTIFICATE OF MAILING

I hereby certify that I have served a true and correct dopy of the foregoing Amended Complaint on Defendant Richard Velasquez, by depositing said copy in the United States Mail, postage prepaid, addressed to: Richard Velasquez, Post Office Box 700-01756, Canon City, Colorado 81212, this 26th day of May, 1982.

/s/

303-861-1111

Richard Velasquez #01756
P.O. Box 700 Unit 3
Canon City, CO 81212

5-5-82

Hon. Bryon R. White
Circuit Justice, Colorado
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Hon. Bryon R. White,

I'm writing you concerning my appeal. I have not filed anything in the Court yet as I am studying the rules for this. I am proceding Pro Se and have never filed a Petition For Certiorari before. The main problem I have encountered is how long do I have to file my Petition. I am now incarcerated in the Department of Corrections in Canon City, Colorado and the library is a little out of date. We are at least one year behind in our updating of our supplements. The Department has stated that no updating will be done this year as they plan to hire an attorney for the inmates rather than have a library. This will greatly hamper the inmates who are proceeding Pro Se. We have a set of The Supreme Court Digest Lawyer's Edition with the Supreme Rules in Vol. 17? These rules are confusing as to the time limit in which to file a Petition. In the bound Vol. Rule 11 Docketing Cases, it states that I have 90 days in which to file my Notice of Appeal and also my Petition. This same Rule has been changed to Rule 13 in the Supplement but it also states that I have 90 days. The Rule that confuses me on this is Rule 22 in the bound Vol. Review on Certiorari-Time for Petitioning. It states that I have 90 days but this Rule which is Rule 20 in the Supplement states that I only have 60 days. Is this a misprint or something? I have talked to some of the other inmates who study law and they all seem to think it is 90 days.

I did write to the Colorado Supreme Court to ask for assistance but I did not fully explain the situation to them as I had not studied the rules as much at that time. At that time I was working on my Petition for rehearing and I also filed a Motion to Reconsider my Petition for Rehearing. At that thime I requested an advisory counsel in order to assist me in filing my Petition to the United States Supreme Court as I am not knowledgable in the procedures. They appear to be more complicated than the Colorado Supreme Court's. I never have filed a Petition in the Colorado Supreme Court either as I had an attorney at that time. After he left my case he did not give me all the papers and therefore I don't even have a copy of one to copy from. I have filed briefs with the Colorado Supreme Court however and I simply copied the form from my prior attorney's brief. I think I understand how to do everything but I am confused as to what goes into the jurisdictional statement. In reading the Rules it seems that the jurisdictional statement and the petition and brief are similar. Am I allowed to use case law in a jurisdictional statement or the petition. The rules state that these should be brief statements of my arguments. Is this similar to a Motion For New Trial. I have studied this type of motion and no case law is cited in it and the statement is very brief.

In conclusion I would request that you treat this letter as a Motion For a Continuance if in fact the time limit is 60 days instead of 90 days as I will need the extra 30 days to figure everything out. I already have all the information typed out and I could be prepared to file a brief in just a few days but I am not familiar with the jurisdictional statement or the petition. If possible I request this Honorable Court to appoint me advisory counsel for the purpose of assisting me in filing a proper jurisdictional statement and petition. The book we have does not

have any updated forms in it either. The Supplement states that the forms in the bound Volume no longer conform to the Rules but it does not contain any new ones. Therefore I have decided to file my Notice of Appeal using the same form that the Colorado Supreme Court uses. I will send this in this week as it is ready to go but needs to be typed out properly. The United States Supreme Court should receive this soon as I understand that the Colorado Supreme Court sends a copy of this to them as soon as they get it. If the Court does not deem it proper to appoint an advisory counsel to my case I request that the Court supply me with a copy of the current rules and forms so that I can follow. I have been proceeding in Forma Pauperis in the Court below and hope to remain so in this Court. I will file the proper motion for this with my jurisdictional statement. I understand it is necessary with each additional court.

The decision I am appealing is Case No. 80SA517, Decided February 16, 1982 in the Colorado Supreme Court. I filed a timely Petition For Rehearing which was denied March 15, 1982 and the judgment entered March 19, 1982. I understand that the time to Petition For Certiorari to the United States Supreme Court begins to run from the time of dinial of my Petition For Rehearing. Thus if I only have 60 days, my time is almost out. If I have 90 days I would still have time to sort everything out, I think. Thank You for your time. If you request I will file formal motions. I wasn't sure how to do this as the Rules state that some things should be directed to the Circuit Justice rather than the Court itself and therefore I wrote it in letter form. I would also like to know if I should use letter or legal size paper. The Colorado courts now use letter size with single spacing and I hear the Federal courts are going to change also. Is this True?

DATED MAY 5, 1982.

Respectfully Submitted

Richard Velasquez, Pro Se #01756
Montrose, Colorado
P.O. Box 700 Unit 3
Canon City, CO 81212

16-15-102. Ex parte order for wiretapping and eavesdropping. (1) (a) An ex parte order for wiretapping or eavesdropping, or both, as those offenses are described in sections 18-9-302 to 18-9-304, C.R.S. 1973, may be issued by any judge of competent jurisdiction of the state of Colorado upon application of the attorney general or a district attorney, showing by affidavit that there is probable cause to believe that evidence will be obtained of the commission of any one of the crimes enumerated in this subsection (1) or that one of said enumerated crimes will be committed:

(I) Murder in the first or second degree as defined in sections 18-3-102 and 18-3-103, C.R.S. 1973;

(II) Kidnapping in the first or second degree as defined in sections 18-3-301 and 18-3-302, C.R.S. 1973;

(III) Gambling, meaning professional gambling, as defined in section 18-10-102 (3), C.R.S. 1973, and subject to prosecution under section 18-10-103 (2), C.R.S. 1973;

(IV) Robbery as defined in section 18-4-301, C.R.S. 1973, aggravated robbery as defined in section 18-4-302, C.R.S. 1973, or burglary in the first or second degree as defined in sections 18-4-202 and 18-4-203, C.R.S. 1973;

(V) Bribery as defined in section 18-8-302, C.R.S. 1973, compensation for past official behavior as defined in section 18-8-303, C.R.S. 1973, attempt to influence a public servant as defined in section 18-8-306, C.R.S. 1973, designation of supplier as defined in section 18-8-307, C.R.S. 1973, or misuse of official information as defined in section 18-8-402, C.R.S. 1973;

(VI) Dealing in narcotic or other dangerous drugs as covered by sections 12-22-322 and 12-22-412, C.R.S. 1973, as such offenses are subject to prosecution as felonies;

(VII) Crimes dangerous to life, limb, or property, meaning extortion, as defined as menacing by use of a deadly weapon in section 18-3-206, C.R.S. 1973, theft by means other than the use of force, threat, or intimidation as defined in section 18-4-401 (5), C.R.S. 1973, arson as defined in sections 18-4-102 to 18-4-105, C.R.S. 1973, as these offenses are subject to prosecution as felonies, assault in the first or second degree as defined in sections 18-3-202 and 18-3-203, C.R.S. 1973; or

(VIII) A criminal conspiracy as defined in section 18-2-201, C.R.S. 1973, to commit any of the aforementioned enumerated crimes.

(b) Anything to the contrary notwithstanding, an ex parte order for wiretapping or eavesdropping may be issued only for a crime specified in this subsection (1) for which a felony penalty is authorized upon conviction.

(2) Each application for wiretapping or eavesdropping, or both, shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) The identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) A complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including: Details as to the particular offense that has been, is being, or is about to be committed; a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted; a particular description of the type of communication sought to be

intercepted; the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) A complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried, or to be too dangerous;

(d) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, there shall be required a particular description of the facts establishing probable cause to believe that additional communications of the same type will occur thereafter.

(e) A complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each such application; and

(f) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain those results.

(3) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(4) Upon an application, the judge may enter an ex parte order, as requested or as modified, authorizing or approving wiretapping or eavesdropping within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that:

(a) There is probable cause for belief that a person is committing, has committed, or is about to commit a particular offense enumerated in this section;

(b) There is probable cause for belief that particular communications concerning that offense will be obtained through the interception;

(c) Normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous;

(d) There is probable cause for belief that the facilities from which or the place where the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of an offense, or are leased to, listed in the name of, or commonly used by the person alleged to be involved in the commission of the offense.

(5) Each order authorizing or approving wiretapping or eavesdropping shall specify:

(a) The identity of the person, if known, whose communications are to be intercepted;

(b) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) A particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) The identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) The period of time during which an interception is authorized, including a statement as to whether or not the interception automatically terminates when the described communication is first obtained.

(6) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. An extension of an order may be granted, but only upon application for an extension made in accordance with subsection (2) of this section, and the court making the findings required by subsection (4) of this section. The period of the extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted, and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception under this section, and must terminate upon attainment of the authorized objective, or in any event in thirty days. No more than one extension may be granted for any order entered under this section.

(7) If an order authorizing interception is entered pursuant to this section, the order may require reports to be made to the judge who issued the order, showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such report shall be made at such times as the judge may require.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this section shall, if possible, be recorded on tape, wire, or other comparable device. The recording of the contents of any wire or oral communication under this subsection (8) shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon expiration of the period of the order, or extension thereof, the recording shall be made available to the judge issuing the order and sealed under his directions. Custody of the recording shall be wherever the judge orders. A recording shall not be destroyed except upon an order of the judge, and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of this section. The presence of the seal provided for by this subsection (8), or a satisfactory explanation for the absence thereof, is a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived under this section.

(b) Applications made and orders granted under this section shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. The applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction, and shall not be destroyed except on order of the judge to whom presented, and in any event shall be kept for ten years. Information obtained pursuant to a court order authorizing interception of wire or oral communications shall not be used, published, or divulged except in accordance with the provisions of this article.

(c) Any violation of the provisions of this subsection (8) may be punished as contempt of court.

(d) Within a reasonable time, but not later than ninety days after the filing of an application for an order of approval under this section, which application is denied, or after the termination of the period of an order or extensions thereof, the judge to whom the application was presented shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion is in the interest of justice, notice of the following:

(I) The fact of the entry of the order or application;

(II) The date of the entry and the period of authorized, approved, or disapproved interception, or the denial of the application; and

(III) The fact that during the period wire or oral communications were or were not intercepted. The judge, upon the filing of a motion, may, in his discretion, make available to any such person or his counsel for inspection such portions of the intercepted communications, applications, and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the matter required by this paragraph (d) may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a state court, unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the court if it finds that it was not possible to furnish the party with the information ten days before the trial, hearing, or proceeding, and that the party will not be prejudiced by the delay in receiving this information.

(10) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the state of Colorado, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that: The communication was unlawfully intercepted; the order of authorization or approval under which it was intercepted is insufficient on its face; or the interception was not made in conformity with the order of authorization or approval. This motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion, or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall not be received as evidence.

(11) In addition to any other right to appeal, the state of Colorado has the right to appeal from an order granting a motion to suppress made under subsection (10) of this section, or the denial of an application for an order of approval, if the person making or authorizing the application certifies to the judge granting the motion or denying an application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(12) Any investigative or law enforcement officer who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that this disclosure is appropriate in the proper performance of the official duties of the officer making or receiving the disclosure.

(13) Any investigative or law enforcement officer who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use those contents to the extent the use is appropriate in the official performance of his official duties.

(14) Any person who has received, by any means authorized by this section, any information concerning a wire or oral communication, or evidence derived therefrom, intercepted in accordance with the provisions of this section, may disclose the contents of that communication or derivative evidence while giving testimony in any criminal proceeding in any court of this state or in a grand jury proceeding.

(15) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this section shall lose its privileged character.

(16) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized in this section, intercepts wire or oral communications relating to an offense other than one specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (12) and (13) of this section only if an offense other than one specified in the order is an offense which constitutes a felony under Colorado statutes. The contents, and evidence derived therefrom, as authorized by this section, may be used under subsection (14) of this section only when authorized or approved by a judge of competent jurisdiction, when the judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this section. This application shall be made as soon as practicable.

Source: L. 71, p. 486, § 2; C.R.S. 1963, § 39-24-2; L. 72, pp. 269, 270, §§ 1, 2; L. 75, p. 631, § 3.

I. General Consideration.
II. Application.
III. Order.
IV. Use of Contents and Evidence.
  A. In General.
  B. Of Other Offenses.
V. Suppression of Contents and Evidence.

I. GENERAL CONSIDERATION.

Annotator's note. Since § 16-15-102 is similar to repealed § 40-4-30, C.R.S. 1963, relevant cases construing § 40-4-30 have been included in the annotations to § 16-15-102.

Law review. For note, "Right of Privacy and Emotional Distress in Colorado", see 43 U. Colo. L. Rev. 147 (1971).

Section held constitutional. See People v. Martin, 176 Colo. 322, 490 P.2d 924 (1971).

Section is not an unconstitutional invasion of privacy. People v. Milnes, 186 Colo. 409, 527 P.2d 1163 (1974).

Because the benefits to society from crimes solved or frustrated by the use of wiretapping outweigh the limited invasion. People v. Milnes, 186 Colo. 409, 527 P.2d 1163 (1974).

Problem of electronic surveillance. The reason for the seriousness of the problem arises not from the fact that particular conversations are not specifically described and specifically authorized, but rather from the unmanageability generally of electronic surveillance, for the area is peculiarly sensitive due to its effort to probe the thoughts of man who is the object of the search. People v. Martin, 176 Colo. 322, 490 P.2d 924 (1971).

This section allows law enforcement officers to intercept telephone communications after having obtained judicial authorization upon a showing of probable cause. People v. Martin, 176 Colo. 322, 490 P.2d 924 (1971).

Crime within scope of section. Where the crimes for which the defendant is charged (possession, conspiracy to possess, possession for sale, conspiracy to possess narcotic drugs for sale) have a minimum penalty of from 2 to 10 years in the state penitentiary, he falls within the scope of this section. People v. Martin, 176 Colo. 322, 490 P.2d 924 (1971).

II. APPLICATION.

Application showing probable cause required. An ex parte order for wiretapping or eavesdropping may be issued only upon application stating that there is probable cause to believe that evidence may be obtained. People v. Martin, 176 Colo. 322, 490 P.2d 924 (1971).

An interception order may be issued only after a judge of competent jurisdiction has

error and outlining any arguments to be made shall be filed in the district court by the appellant within twenty days after certification of the record. A copy of the appellant's brief shall be served upon the appellee. The appellee may file an answering brief within twenty days after such service. A reply brief may be filed within ten days after service of the answering brief. In the discretion of the district court, the time for filing briefs and answers may be extended.

(f) Stay of Execution. Pending the docketing of the appeal, a stay of execution shall be granted by the county court upon request. If a sentence of imprisonment has been imposed, the defendant may be required to post bail, and if a fine and costs have been imposed, a deposit of the amount thereof may be required by the county court. Upon a request for stay of execution made any time after the docketing of the appeal, such action may be taken by the district court. Stays of execution granted by the county court or district court and, with the written consent of the sureties if any, bonds posted with such courts shall remain in effect until after final disposition of the appeal, unless modified by the district court.

(g) Trials de Novo; Penalty Not Increased. If for any reason an adequate record cannot be certified to the district court the case shall be tried de novo in that court. No action on appeal shall result in an increase in penalty.

(h) Judgment; How Enforced. Unless there is further review by the Supreme Court upon writ of certiorari pursuant to the rules of such court, after final disposition of the appeal the judgment on appeal entered by the district court shall be certified to the county court for action as directed by the district court, except in cases tried de novo by the district court or in cases in which the district court modifies the county court judgment, and in such cases, the judgment on appeal shall be that of the district court and so enforceable.

(i) Appeals to Superior Court. In counties in which a superior court has been established, appeals from the county court shall be taken to the superior court rather than the district court. All of the provisions of this section governing appeals from the county court to the district court are applicable when the appeal is taken to the superior court, and the term "district court" as used in this section shall be understood to include the superior court.

Cross references. As to appeals from county court, see also § 16-2-114. As to review of judgments in criminal cases, see also § 16-12-101 et seq.

Am. Jur. See 4 Am. Jur.2d, Appeal and Error, § § 159, 397.

C.J.S. See 24A C.J.S., Criminal Law, § § 1711, 1719.

Finality attaches upon expiration of 30 days. Where judgment and sentence had been entered in the county court, at the expiration of 30 days—no notice of appeal having been filed—it became final. Mills v. People, 181 Colo. 168, 509 P.2d 594 (1973).

And filing of motion for new trial does not automatically extend time. The filing of a motion for a new trial does not have the effect of automatically extending the time to file a notice of appeal as prescribed by this rule. Mills v. People, 181 Colo. 168, 509 P.2d 594 (1973).

Rules 38 to 40. Appeals from the District Court

See Colorado Appellate Rules.

VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 41. Search, Seizure, and Confession

(a) Authority to Issue Warrant. A search warrant authorized by this Rule may be issued by any judge of a court of record.

(b) **Grounds for Issuance.** A search warrant may be issued under this Rule to search for and seize any property:

(1) Which is stolen or embezzled; or

(2) Which is designed or intended for use as a means of committing a criminal offense; or

(3) Which is or has been used as a means of committing a criminal offense; or

(4) The possession of which is illegal; or

(5) Which would be material evidence in a subsequent criminal prosecution in this state or in another state; or

(6) The seizure of which is expressly required, authorized, or permitted by any statute of this state; or

(7) Which is kept, stored, maintained, transported, sold, dispensed, or possessed in violation of a statute of this state, under circumstances involving a serious threat to public safety or order, or to public health.

(c) **Application for Search Warrant.** (1) A search warrant shall issue only on affidavit sworn to or affirmed before the judge and relating facts sufficient to:

(I) Identify or describe, as nearly as may be, the premises, person, place, or thing to be searched;

(II) Identify or describe, as nearly as may be, the property to be searched for, seized, or inspected;

(III) Establish the grounds for issuance of the warrant, or probable cause to believe that such grounds exist; and

(IV) Establish probable cause to believe that the property to be searched for, seized, or inspected is located at, in, or upon the premises, person, place, or thing to be searched.

(2) The affidavit required by this section may include sworn testimony reduced to writing and signed under oath by the witness giving the testimony before issuance of the warrant. A copy of the affidavit and a copy of the transcript of testimony taken in support of the request for a search warrant shall be attached to the search warrant filed with the court.

(d) **Issuance, Contents, Execution, and Return of Warrant.** (1) If the judge is satisfied that grounds for the application exist, or that there is probable cause to believe that such grounds exist, he shall issue a search warrant, which shall:

(I) Identify or describe, as nearly as may be, the premises, person, place, or thing to be searched;

(II) Identify or describe, as nearly as may be, the property to be searched for, seized, or inspected;

(III) State the grounds or probable cause for its issuance; and

(IV) State the names of the persons whose affidavits of testimony have been taken in support thereof.

(2) The search warrant may also contain such other and further orders as the judge may deem necessary to comply with the provisions of a statute, charter, or ordinance, or to provide for the custody or delivery to the proper officer of any property seized under the warrant, or otherwise to accomplish the purposes of the warrant.

(3) Unless the court otherwise directs, every search warrant authorizes the officer executing the same:

(I) To execute and serve the warrant at any time; and

(II) To use and employ such force as may reasonably be necessary in the performance of the duties commanded by the warrant.

(4) **Joinder.**

The search of one or more persons, premises, places, or things, may be commanded in a single warrant or in separate warrants, if compliance is made with Rule 41(c)(1)(IV) of these Rules.

(5) **Execution and Return.** (I) Except as otherwise provided in this Rule, a search warrant shall be directed to any officer authorized by law to execute it in the county wherein the property is located.

(II) Any judge issuing a search warrant, for the search of a person or for the search of any motor vehicle, aircraft, or other object which is mobile or capable of being transported may make an order authorizing a peace officer to be named in such warrant to execute the same, and the person named in such order may execute such warrant anywhere in the state. All sheriffs, coroners, police officers, and officers of the Colorado State Patrol, when required, in their respective counties, shall aid and assist in the execution of such warrant. The order authorized by this subsection (5) may also authorize execution of the warrant by any officer authorized by law to execute it in the county wherein the property is located.

(III) When any officer, having a warrant for the search of a person or for the search of any motor vehicle, aircraft, or other object which is mobile or capable of being transported, shall be in pursuit thereof and such person, motor vehicle, aircraft, or other object shall cross or enter into another county, such officer is authorized to execute the warrant in such other county.

(IV) It shall be the duty of all peace officers into whose hands any search warrant shall come, to execute the same, in their respective counties or municipalities, and make due return thereof.

(V) A search warrant shall be executed within ten days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge upon request shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the county where the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that:

(1) The property was illegally seized without warrant; or

(2) The warrant is insufficient on its face; or

(3) The property seized is not that described in the warrant; or

(4) There was not probable cause for believing the existence of the grounds on which the warrant was issued; or

(5) The warrant was illegally executed.

The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the court where the trial is to be had. The motion shall be made and heard before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court, in its discretion, may entertain the motion at the trial.

(f) Return of Papers to Clerk. The judge who has issued a search warrant shall attach to the warrant a copy of the return, inventory, and all other papers in connection therewith and shall file them with the clerk of the district court for the county of origin. If a case has been filed in the district court after the issuance of the search warrant, the clerk of the district court shall notify the clerk of the county court which issued it that the search warrant has been filed in the district court. When the search warrant has been issued by the county judge and there is no subsequent filing in the district court, after the issuance of the search warrant, the documents shall remain in the county court.

(g) Suppression of Confession or Admission. A defendant aggrieved by an alleged involuntary confession or admission made by him, may make a motion under this Rule to suppress said confession or admission. The motion shall be made and heard before trial unless opportunity therefor did not exist or defendant was not aware of the grounds for the motion, but the court, in its discretion, may entertain the motion at the trial. The judge shall receive evidence on any issue of fact necessary to the decision of the motion.

(h) Scope and Definition. This Rule does not modify any statute, inconsistent with it, regulating search, seizure, and the issuance and execution of search warrants in circumstances for which special provision is made.

I. General Consideration.
II. Authority.
III. Grounds.
IV. Application.
V. Issuance, Contents, Execution and Return.
A. Issuance and Contents.
B. Joinder.
C. Execution and Return.
VI. Motion to Suppress.
A. Aggrieved Party May Move.
B. No Warrant.
C. Warrant Insufficient.
D. Property not Described.
E. No Probable Cause for Warrant.
F. Warrant Illegally Executed.
G. Motion; Hearing; Return of Property.
VII. Return of Papers to Clerk.
VIII. Suppression of Confession or Admission.

I. GENERAL CONSIDERATION.

Cross reference. As to constitutional right against unreasonable searches and seizures, see amend. IV, U.S. Const. and § 7 of art. II, Colo. Const.

Am. Jur. See 68 Am. Jur.2d, Searches and Seizures, § § 42, 61, 67, 71, 72, 74, 81, 83, 107, 116.

C.J.S. See 79 C.J.S., Searches and Seizures, § § 70-77, 85-98.

Annotator's note. Cases relevant to Rule 41, Crim. P., decided prior to the adoption of the present Rules of Criminal Procedure in 1974 have been included in the annotations to Rule 41, Crim. P.

Law reviews. For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For note, "Search and Seizure Since Mapp", see 36 U. Colo. L. Rev. 391 (1964). For comment on Hernandez v. People, 153 Colo. 316, 385 P.2d 996 (1963), appearing below, see 36 U. Colo. L. Rev. 435 (1964).

Standard for determining whether search warrant complies with constitutional requirements is one of practical accuracy rather than technical nicety. People v. Ragulsky, 184 Colo. 86, 518 P.2d 286 (1974).

.7. A summons issuing out of this Court in any original action shall be served on the defendant 60 days before the return day set out therein; and if the defendant, on such service, shall not respond by the return day, the plaintiff shall be at liberty to proceed *ex parte*.

.8. Any process against a State issued from the Court in an original action shall be served on the Governor and Attorney General of such State.

(Amended effective Nov. 21, 1980)

CROSS REFERENCES

Fees, see Rule 45.

RESEARCH GUIDE

US Supreme Court Digest:
Supreme Court of the United States §§ 71–80

Am Jur:
32 Am Jur 2d, Federal Practice and Procedure § 225.

Forms:
2 Fed Proc Forms, Appeal, Certiorari, and Review §§ 3:731, 3:733–3:742.

CASE NOTES

In a suit brought in the United States Supreme Court by the United States against the State of Louisiana to determine rights in lands underlying the Gulf of Mexico, the court, acting pursuant to Rules 9(2) and (6) of its Revised Rules, Rule 21 of the Federal Rules of Civil Procedure, and its equity powers, will grant leave to other states situated on the Gulf to intervene, in view of their possible interests in the subject matter of the suit. United States v Louisiana, 354 US 515, 1 L Ed 2d 1525, 77 S Ct 1373 (1957).

In an original action in the Supreme Court of the United States instituted by the state of Utah against the United States pursuant to a special statute authorizing the Secretary of the Interior to issue quitclaim deed to the state of the Federal Government's interest in the Great Salt Lake, including relicted lands resulting from shrinkage of the lake, and obliging the state to either pay the amount fixed by the Secretary as the fair value of the federal interest or to institute the original action to determine the extent of the federal claim (80 Stat 192, as amended, 80 Stat 349), a private landowner who also asserts a claim to certain of the relicted lands is not entitled to intervene as a party defendant under Rule 19(a) of the Federal Rules of Civil Procedure on the ground that such owner's absence would leave the state subject to incurring double obligations if it should be found liable to the United States for such lands, since (1) under Supreme Court Rule 9(2), the Federal Rules are a guide to the conduct of original actions in the Supreme Court only where their application is appropriate, (2) the original jurisdiction of the Supreme Court should be invoked sparingly, and (3) thus, the state of Utah, which consistently opposed the landowner's motion to intervene, could properly waive the protection of Rule 19. Utah v United States, 394 US 89, 22 L Ed 2d 99, 89 S Ct 761 (1969).

PART IV. JURISDICTION ON APPEAL

Rule 10. Appeal—How Taken—Parties—Cross-Appeal

.1. An appeal to this Court permitted by law shall be taken by filing a notice of appeal in the form, within the time, and at the place prescribed by this Rule, and shall be perfected by docketing the case in this Court as provided in Rule 12.

.2. The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from, giving the date of its entry, and shall specify the statute or statutes under which the appeal to this Court is taken. A copy of the notice of appeal shall be served on all parties to the proceeding in the court where the judgment appealed from was issued, in the manner prescribed by Rule 28, and proof of service shall be filed with the notice of appeal.

.3. If the appeal is taken from a federal court, the notice of appeal shall be filed with the clerk of that court. If the appeal is taken from a state court, the notice of appeal shall be filed with the clerk of the court from whose judgment the appeal is taken, and a copy of the notice of appeal shall be filed with the court possessed of the record.

.4. All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this Court, unless the appellant shall notify the Clerk of this Court in writing of appellant's belief that one or more of the parties below has no interest in the outcome of the appeal. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested my remain a party here by notifying the Clerk, with service on the other parties, that he has an interest in the appeal. All parties other than appellants shall be appellees, but any appellee who supports the position of an appellant shall meet the time schedule for filing papers which is provided for that appellant, except that any response by such appellee to a jurisdictional statement shall be filed within 20 days after receipt of the statement.

.5. The Court may permit an appellee, without filing a cross-appeal, to defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted.

.6. Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or any one or more of them may appeal separately; or any two or more of them may join in an appeal. Where two or more cases that involve identical or closely related questions are appealed from the same court, it will suffice to file a single jurisdictional statement covering all the issues.

.7. An appellee may take a cross-appeal by perfecting an appeal in the normal manner or, without filing a notice of appeal, by docketing the cross-appeal within the time permitted by Rule 12.4.

CROSS REFERENCES

This rule is referred to in Rule 11.

RESEARCH GUIDE

US Supreme Court Digest:

Appeal and Error §§ 851–858, 952–969

Am Jur:

32 Am Jur 2d, Federal Practice and Procedure §§ 269, 300, 326.

Forms:

2 Fed Proc Forms, Appeal, Certiorari, and Review §§ 3:764–3:767.

2 Am Jur Pl & Pr Forms (Rev), Appeal and Error, Form 132.

11 Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 2251–2253.

Annotations:

Supreme Court's views as to remedies available in Supreme Court to compel lower court's compliance with Supreme Court's earlier decision in case. 43 L Ed 2d 921.

CASE NOTES

Upon the allowance of an appeal by a judge of a district court, the case is transferred from the district court to the Supreme Court and subsequent steps for dismissal or affirmance are to be taken there. Steps allowed in the district court after the allowance of appeal, such as preparation of the record, extension of time and cost or supersedeas bonds, are for convenience taken in the court possessed of the certified transcript of the record, where it does not appear that the stipulation has received the approval of the court, since adherence to the rule as to the preparation of records is important for the protection of the court whose decision is under review as well as of this Court. DeJonge v Oregon, 299 US 353, 81 L Ed 278, 57 S Ct 255 (1937).

The U.S. Supreme Court does not approve of the practice of substituting a stipulation

of facts, which was made and filed after the decision of the Supreme Court of the State and after the Chief Justice of that court had allowed the appeal and had directed transmission to the U.S. Supreme Court of a record. United Public Workers v Mitchell, 330 US 75, 91 L Ed 754, 67 S Ct 556 (1947).

Under Rule 302(f) of the Supreme Court's Rules, the Supreme Court will not consider an argument not made in the state court below and not reserved in the notice of appeal to the Supreme Court. Head v New Mexico Board of Examiners in Optometry, 374 US 424, 10 L Ed 2d 983, 83 S Ct 1759 (1963).

Rule 11. Appeal, Cross-Appeal—Time for Taking

.1. An appeal to review the judgment of a state court in a criminal case shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the court from whose judgment the appeal is taken within 90 days after the entry of such judgment and the case is docketed within the time provided in Rule 12. See 28 U. S. C. § 2101(d) [28 USCS § 2101(d)].

.2. An appeal in all other cases shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided in Rule 12. See 28 U. S. C. §§ 2101 (a), (b), and (c) [28 USCS § 2101(a), (b), and (c)].

.3. The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties (whether or not they requested rehearing or joined in the petition for rehearing, or whether or not the petition for rehearing relates to an issue the other parties would raise) runs from the date of the denial of rehearing or the entry of a subsequent judgment.

.4. The time for filing a notice of appeal may not be extended.

.5. A cross-appeal shall be in time if it complies with this Rule or if it is docketed as provided in Rule 12.4.

RESEARCH GUIDE

US Supreme Court Digest:
Appeal and Error §§ 874–889

Am Jur:
32 Am Jur 2d, Federal Practice and Procedure §§ 270, 273.

Forms:
2 Fed Proc Forms, Appeal, Certiorari, and Review §§ 3:764–3:767.

Rule 12. Docketing Cases

.1. Not more than 90 days after the entry of the judgment appealed from, it shall be the duty of the appellant to docket the case in the manner set forth in paragraph .3 of this Rule, except that in the case of appeals pursuant to 28 U. S. C. §§ 1252 or 1253 [28 USCS §§ 1252 or 1253] the time limit for docketing shall be 60 days from the filing of the notice of appeal. See 28 U. S. C. § 2101 (a) [28 USCS § 2101(a)]. The Clerk will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed.

.2. For good cause shown, a Justice of this Court may extend the time for docketing a case for a period not exceeding 60 days. An application for extension of time within which to docket a case must set out the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed, must have appended a copy of the opinion, must specify the date and place of filing of the notice of appeal and append a copy thereof, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42.2, and 43. Such applications are not favored.

.3. Counsel for the appellant shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. The case then will be placed on the docket. It shall be the duty of counsel for appellant to notify all appellees, on a form supplied by the Clerk, of the date of docketing and of the docket number of the case. Such notice shall be served as required by Rule 28.

.4. Not more than 30 days after receipt of the statement of jurisdiction, counsel for an appellee wishing to cross-appeal shall enter an apperance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a printed statement as to jurisdiction on cross-appeal, which shall comply in all respects with Rule 15. The cross-appeal will then be placed on the docket. The issues tendered by a timely cross-appeal docketed under this paragraph may be considered by the Court only in connection with a separate and duly perfected appeal over which this Court has jurisdiction without regard to this paragraph. It shall be the duty of counsel for the cross-appellant to notify the cross-appellee on a form supplied by the Clerk of the date of docketing and of the docket number of the cross-appeal. Such notice shall be served as required by Rule 28. A statement of jurisdiction on cross-appeal may not be joined with any other pleading. The Clerk shall not accept any pleadings so joined. The time for filing a cross-appeal may not be extended.

CROSS REFERENCES

This rule is referred to in Rules 10, 11, and 15.

RESEARCH GUIDE

US Supreme Court Digest:

Appeal and Error §§ 1012–1016

Am Jur:

32 Am Jur 2d, Federal Practice and Procedure §§ 269, 270, 276, 277, 278.

Forms:

2 Fed Proc Forms, Appeal, Certiorari, and Review §§ 3:752, 3:781–3:787, 3:794, 3:795, 3:801, 3:805, 3:807.

11 Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 2256–2258, 2301.

CASE NOTES

The requirement of the act [28 USC § 380a] providing for the taking of an appeal directly to the Supreme Court of the United States from a district court in a case in which the constitutionality of an act of Congress is brought in question and of a Supreme Court Rule providing that such appeal shall be docketed in the Supreme Court within sixty days from the time it is allowed under such rules as may be prescribed by the proper courts, is not jurisdictional, and such an appeal is therefore within the operation of Supreme Court Rule 14 as to the steps to be taken to procure a dismissal in case of delay in docketing a cause in which an appeal has been taken, and as to extensions of time. United Public Workers v Mitchell, 330 US 75, 91 L Ed 754, 67 S Ct 556 (1947).

An appeal will be dismissed by the Supreme Court of the United States for appellant's failure to comply with the time requirements of Supreme Court Rule 13(1) [predecessor to Rule 12], where the case was not docketed nor the record filed until 20 days after expiration of the 60-day period provided by the Rule, during that period appellant made no application for an enlargement of time nor did any explanation accompany the untimely docketing of the appeal, and only in its reply to appellee's motion to dismiss appellant stated that the delay was occasioned by a misunderstanding between counsel for appellant. Pittsburgh Towing Co. v Mississippi Valley Barge Line Co. 385 US 32, 17 L Ed 2d 31, 87 S Ct 195 (1966).

Appellant's failure to docket an appeal until 56 days after the expiration date of the 60-day period provided by Rule 13(1) [predecessor to Rule 12] is a defect which is not jurisdictional. Johnson v Florida, 391 US 596, 20 L Ed 2d 838, 88 S Ct 1713 (1968).

Rule 13. Certification of the Record.

.1. An appellant at any time prior to action by this Court on the jurisdictional statement, may request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this Court, but the filing of the record in this Court is not required for the docketing of an appeal. If the appellant has not done so, the appellee may request such clerk to certify and transmit the record or any part of it. Thereafter, the Clerk of this Court or any party to the appeal may request that additional parts of the record be certified and transmitted to this Court. Copies of all requests for certification and transmission shall be sent to all parties. Such requests to certify the record prior to action by the Court on the jurisdictional statement, however, shall not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by this Court.

.2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness.

.3. The record may consist of certified copies. But whenever it shall appear necessary or proper, in the opinion of the presiding judge of the court from which the appeal is taken, that original papers of any kind should be inspected in this Court in lieu of copies, the presiding judge may make any rule or order for safekeeping, transporting, and return of the original papers as may seem proper to him. If the record or stipulated portions thereof have been printed for the use of the court below, this printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the Clerk of this Court otherwise requests.

.4. When more than one appeal is taken to this Court from the same judgment, it shall be sufficient to prepare a single record containing all the matter designated by the parties or the Clerk of this Court, without duplication.

CROSS REFERENCES

This rule is referred to in Rule 19.

RESEARCH GUIDE

US Supreme Court Digest:

Appeal and Error §§ 986-1091

Am Jur:

32 Am Jur 2d, Federal Practice and Procedure § 274.

Forms:

2 Fed Proc Forms, Appeal, Certiorari, and Review §§ 3:772, 3:773, 3:783.

11 Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 2254, 2255.

Rule 14. Dismissing Appeals

.1. After a notice of appeal has been filed, but before the case has been docketed in this Court, the parties may dismiss the appeal by stipulation filed in the court whose judgment is the subject of the appeal, or that court may dismiss the appeal upon motion and notice by the appellant. For dismissal after the case has been docketed, see Rule 53.

.2. If a notice of appeal has been filed but the case has not been docketed in this Court within the time for docketing, plus any enlargement thereof duly granted, the court whose judgment is the subject of the appeal may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such order thereon with respect to costs as may be just.

.3. If a notice of appeal has been filed but the case has not been docketed in this Court within the time for docketing, plus any enlargement thereof duly granted, and the court whose judgment is the subject of the appeal has denied for any

reason an appellee's motion to dismiss the appeal, made as provided in the foregoing paragraph, the appellee may have the cause docketed and may seek to have the appeal dismissed in this Court, by producing a certificate, whether in term or vacation, from the clerk of the court whose judgment is the subject of the appeal, establishing the foregoing facts, and by filing a motion to dismiss, which shall conform to Rule 42 and be accompanied by proof of service as prescribed by Rule 28. The clerk's certificate shall be attached to the motion, but it shall not be necessary for the appellee to file the record. In the event that the appeal is thereafter dismissed, the Court may give judgment for costs against the appellant and in favor of appellee. The appellant shall not be entitled to docket the cause after the appeal shall have been dismissed under this paragraph, except by special leave of Court.

CROSS REFERENCES

Special rule for service where constitutionality of law is in issue, see Rule 28.
Motions to the Court, see Rule 42.

RESEARCH GUIDE

US Supreme Court Digest:
Appeal and Error §§ 1234–1235

Am Jur:
32 Am Jur 2d, Federal Practice and Procedure § 329.

Forms:
2 Federal Procedural Forms, Appeal, Certiorari, and Review §§ 3:791–3:797.
15 Federal Procedural Forms L Ed, Statutes of Limitation, and Other Time Limits §§ 61:2, 61:22.
11 Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 2259–2262.

Rule 15. Jurisdictional Statement

.1. The jurisdictional statement required by Rule 12 shall contain, in the order here indicated:

(a) The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all such parties. This listing may be done in a footnote. See Rule 28.1.

(c) A table of contents and table of authorities, if required by Rule 33.5.

(d) A reference to the official and unofficial reports of any opinions delivered in the courts or administrative agency below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked, showing:

(i) The nature of the proceeding and, if the appeal is from a federal court, the statutory basis for federal jurisdiction.

(ii) The date of the entry of the judgment or decree sought to be reviewed, the date of any order respecting a rehearing, the date the notice of appeal was filed, and the court in which it was filed. In the case of a cross-appeal docketed under Rule 12.4, reliance upon that Rule shall be expresly noted, and the date of receipt of the appellant's jurisdictional statement by the appellee-cross-appellant shall be stated.

(iii) The statutory provision believed to confer jurisdiction of the appeal on this Court, and, if deemed necessary, the cases believed to sustain jurisdiction.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations that the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text then shall be set forth in the appendix referred to in subparagraph 1(j) of this Rule.

(g) A *concise* statement of the case containing the facts material to consideration of the questions presented. The statement of the case shall also specify the stage in the proceedings (both in the court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the court.

(h) A statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

(i) If the appeal is from a decree of a district court granting or denying a preliminary injunction, a showing of the matters in which it is contended that the court has abused its discretion by such action. See United States v. Currick, 298 U. S. 435 (1936); Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310 (1940).

(j) An appendix containing, in the following order:

(i) Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of its entry.

(iii) A copy of the judgment or decree appealed from and any order on rehearing, including in each the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry of the judgment, decree, or order on rehearing.

(iv) A copy of the notice of appeal showing the date it was filed and the name of the court where it was filed.

(v) Any other appended materials.

If what is required by this paragraph to be appended to the statement is voluminous, it may, if more convenient, be separately presented.

.2. The jurisdictional statement shall be produced in conformity with Rule 33. The Clerk shall not accept any jurisdictional statement that does not comply with this Rule and with Rule 33, except that a party proceeding in forma pauperis may proceed in the manner provided in Rule 46.

.3. The jurisdictional statement shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1(f) of this Rule, and the appendices.

(Amended effective Nov. 21, 1980)

CROSS REFERENCES

Form of documents filed with the Court, see Rule 33.
Briefs on merits in general, see Rule 34.
Time for filing briefs on merits, see Rule 35.
Amicus Curiae briefs, see Rule 36.
Proceedings In Forma Pauperis, see Rule 46.

RESEARCH GUIDE

US Supreme Court Digest:
Appeal and Error §§ 807-819, 1004

Am Jur:

32 Am Jur 2d, Federal Practice and Procedure §§ 278, 300, 303.

Forms:

2 Fed Proc Forms, Appeal, Certiorari, and Review §§ 3:803–3:807.

11 Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 2263–2267.

CASE NOTES

The true function of a certificate or statement of a state court by way of amendment of, or addition to, the record, is to aid in the understanding of the record, to clarify it by defining the Federal question with reasonable precision and by showing how the question was raised and decided, so that the Supreme Court upon the record as thus clarified may be able to see that the Federal question was properly raised and was necessarily determined. Honeyman v Hanan, 300 US 14, 81 L Ed 476, 57 S Ct 350 (1937).

Where the record on appeal to the Supreme Court of the United States from a decision of a state court leaves it uncertain whether a Federal question was necessarily passed upon by the state court, the Supreme Court will vacate the judgment and remand the cause to afford an opportunity to amend the record so as to show the nature of the Federal question, how it was raised, and the grounds of its disposition. Honeyman v Hanan, 300 US 14, 81 L Ed 476, 57 S Ct 350 (1937).

The determination by the Supreme Court of the United States that a Federal question was necessarily passed upon by the state court of whose decision review by the Supreme Court of the United States is sought, and whether its decision of that question was necessary to the determination of the cause, must rest upon an examination of the record; and a certificate or statement by the state court that a Federal question has been presented to it and necessarily passed upon is not controlling. Honeyman v Hanan, 300 US 14, 81 L Ed 476, 57 S Ct 350 (1937).

The policy of avoiding a constitutional issue not necessary to a decision has been reflected continuously, not only in decisions, but also in rules of court and in statutes made applicable to jurisdictional matters, including the necessity for reasonable clarity and definiteness, as well as for timeliness, in raising and presenting constitutional questions. Rescue Army v Municipal Ct. 331 US 549, 91 L Ed 1666, 67 S Ct 1409 (1947).

Although the government's jurisdictional statement under Rule 15 raises no question reviewable by the Supreme Court on direct appeal from a District Court's ruling dismissing an indictment, nevertheless where the indictment is valid the appeal will not be dismissed, but the ruling will be set aside and the case remanded for trial. United States v Fruehauf, 365 US 146, 5 L Ed 2d 476, 81 S Ct 547 (1961).

Rule 16. Motion to Dismiss or Affirm—Reply—Supplemental Briefs

.1. Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 29.4, the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading. The Clerk shall not accept any motion so joined.

(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

(d) The Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

.2. A motion to dismiss or affirm shall comply in all respects with Rules 33 and 42. Forty copies, with proof of service as prescribed by Rule 28, shall be filed with the Clerk. The Clerk shall not accept a motion or brief that does not comply with this Rule and with Rules 33 and 42, except that a party proceeding in forma pauperis may proceed in the manner provided in Rule 46. See Rule 28.1.

.3. A motion to dismiss or affirm shall be as short as possible and may not, either separately or cumulatively, exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations included in accordance with Rule 34.1(f), and any appendix.

.4. Upon the filing of such motion, or the expiration of the time allowed therefor, or express waiver of the right to file, the jurisdictional statement and the motion, if any, will be distributed by the Clerk to the Court for its consideration. However, if a jurisdictional statement on cross-appeal has been docketed under Rule 12.4, distribution of both it and the jurisdictional statement on appeal will be delayed until the filing of a motion to dismiss or affirm by the cross-appellee, or the expiration of the time allowed therefor, or express waiver of the right to file.

.5. A brief opposing a motion to dismiss or affirm may be filed by any appellant, but distribution of the jurisdictional statement and consideration thereof by this Court will not be delayed pending the filing of any such brief. Such brief shall be as short as possible but may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.6. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.7. After consideration of the papers distributed pursuant to this Rule, the Court will enter an appropriate order. The order may be a summary disposition on the merits. If the order notes probable jurisdiction or postpones consideration of jurisdiction to the hearing on the merits, the Clerk forthwith shall notify the court below and counsel of record of the noting or postponement. The case then will stand for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court.

.8. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and oral argument, shall address the question of jurisdiction.

(Amended effective Nov. 21, 1980)

CROSS REFERENCES

Special rule for service where constitutionality of law is in issue, see Rule 28.
Form of documents filed with Court, see Rule 33.
Motions to the Court, see Rule 42.

RESEARCH GUIDE

US Supreme Court Digest:
Appeal and Error §§ 1191–1247

Am Jur:
32 Am Jur 2d, Federal Practice and Procedure §§ 264, 279, 326, 330.

Forms:
2 Fed Proc Forms, Appeal, Certiorari, and Review §§ 3:752, 3:811–3:817, 3:972.

11 Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 2266, 2268.

PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 17. Considerations Governing Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

CROSS REFERENCE

Writ of certiorari from Court of Claims, see Court of Claims Rule 154.

RESEARCH GUIDE

US Supreme Court Digest:
Appeal and Error § 910.6

Am Jur:
32 Am Jur 2d, Federal Practice and Procedure §§ 228, 239, 240, 241, 253, 286, 288.

Am Jur Trials:
Defending Antitrust Lawsuits. 24 Am Jur Trials, p.1.

Forms:
2 Fed Proc Forms, Appeal, Certiorari, and Review §§ 3:832, 3:834, 3:861, 3:863, 3:888.

Law Review Articles:
Linzer, The Meaning of Certiorari Denials. 79 Columbia L Rev 1227, November, 1979.

Prettyman, Opposing Certiorari in the United States Supreme Court. 61 Va L Rev 197.

CASE NOTES

The Supreme Court of the United States will not ordinarily review decisions of the United States Court of Appeals for the District of Columbia which are based upon statutes confined in their operation to the District of Columbia, or which declare the common law of the District, but will review decisions of that court in workmen's compensation cases on questions of importance on account of the national scope of the statute under which they are rendered. Del Vecchio v Bowers, 296 US 280, 80 L Ed 229, 56 S Ct 190 (1935).

Despite the absence of a conflicting decision by the Circuit Court of Appeals of any other circuit, a question is an important one under Rule 19 [predecessor to Rule 17] where attention is called to diverse decisions

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Summer List 10, Sheet 1, Page 35

RECEIVED
AUG 20 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
1981/1982 TERM

No. 81-6947

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

RICHARD VELASQUES,

Defendant-Appellant.

MOTION TO SUPPLEMENT ARGUMENT II OF JURISDICTIONAL STATEMENT

Defendant-Appellant, Richard Velasques, and herein after referred to as Defendant, hereby respectfully moves this Honorable Court to grant his Motion to Supplement Argument II of his Jurisdictional Statement and as grounds therefore states as follows:

1. That a recent decision by this Court has been decided which is similar to Defendant's case and Defendant now wishes the Court to consider its decision in such case when deciding his case also. The case is United States v. Ross, No. 80-2209, 72 L.Ed.2d 572, 102 S.Ct. ___, Decided June 1, 1982.

United States v. Ross, supra, involved a case where a defendant was dealing heroin out of his vehicle. An informant had reported that he had purchased some heroin from defendant Ross which was taken from the trunk of the vehicle. The informant stated that Ross had stated that he had more of the drug for sale in the vehicle. The Court ruled that these facts provided probable cause to search the vehicle.

In Defendant's, Richard Velasques, case there was no probable cause to believe that there were more drugs in the Defendant's vehicle and was so stated by the affiant and the informant in this case (Tr. 630-631, 694-695, 662-663). As the record shows, there was only a belief that there was more drugs at Defendant's home and that the marijuana that was seized in the Motel room was the only amount of drug that the Defendant had at that time as he so stated to the informant. This was different from the Ross case because Ross had stated that he had more drugs in the trunk of his vehicle.

Defendant's case also differs from United States v. Ross, supra in that it was pursuant to a warrant while the Ross case was a warrantless search. No probable cause was contained in the warrant. In fact the warrant and

affidavit only provided probable cause to search Defendant's house and not his vehicle. The prosecution did attempt to provide probable cause at the hearing (Tr. 709-715) but none of this was contained in the affidavit nor brought to the attention of a magistrate at the time of the search.

The Ross case also quotes Carroll v. United States, 267 U.S. 132 which was also cited by Defendant in his argument:

> Moreover, the probable cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. "[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the officer, which in the judgment of the court would make his faith reasonable." Carroll v. United States, at 161-162, 69 L.Ed. 543, 45 S.Ct. 280 (quoting Director General v. Kastenbaum, 263 U.S. 25, 28, 68 L.Ed. 146, 44 S.Ct. 32.

WHEREFORE, Defendant, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Colorado and reverse that judgment and order a new trial excluding all evidence obtained from the illegal search and seizure of Defendant's vehicle.

DATED AUGUST 13, 1982.

Respectfully Submitted,

Richard Velasquez

Richard Velasquez, Pro Se #01756
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, Colorado 81212

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within LETTER TO THE COURT AND MOTIONS and MOTION TO SUPPLEMENT ARGUMENT II OF JURISDICTIONAL STATEMENT upon all parties herein by depositing the copies of same in the United States mail, postage prepaid, at Canon City, Colorado, Shadow Mountain Correctional Facility this 13th day of August 1982, addressed as follows:

David K. Rees, 1010
Assistant Attorney General
Office of the Attorney General
1525 Sherman Street, 3d Floor
Denver, Colorado 80203

And by certified mail to:

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Richard Velasquez

Richard Velasquez, Pro Se #01756
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, CO 81212

IN THE
SUPREME COURT OF THE UNITED STATES
1981/1982 TERM

No. 81-6947

RECEIVED
JUL 7 - 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

RICHARD VELASQUEZ,

Defendant-Appellant.

MOTION TO DISMISS

J. D. MacFARLANE
Attorney General

CHARLES B. HOWE
Deputy Attorney General

JOEL W. CANTRICK
Solicitor General

DAVID K. REES
Assistant Attorney General
Office of the Attorney General

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1525 Sherman Street, 3d Floor
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Telephone: 866-3611

IN THE
SUPREME COURT OF THE UNITED STATES
1981/1982 TERM

No. _____

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

RICHARD VELASQUEZ,

Defendant-Appellant.

MOTION TO DISMISS

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1. In his briefs in the Colorado appellate courts, the defendant-appellant did not expressly claim that any state statutes were repugnant to the constitution or laws of the United States.

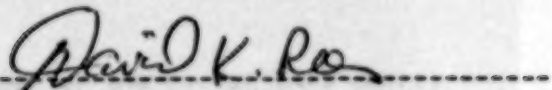
2. Because he did not challenge the constitutionality of any state statutes, the defendant's remedy, if any, is not an appeal to this court, but certiorari. 28 U.S.C. 1257.

3. The Colorado Supreme Court denied the petition for rehearing in this case on March 15, 1982. The defendant's " Notice of Appeal" here was not filed until June 7, 1982, a date beyond the 60 day period allowed for filing a petition for certiorari to this court. Sup. Ct. R. 20.1.

4. Assuming, arguendo, the defendant's application for relief is timely, none of the issues raised here presents a substantial federal question. See People v. Velasquez, ___ Colo. ___, 641 P.2d 943 (1982).

5. Because the defendant's application for relief is untimely and/or fails to present a substantial federal question, it should be dismissed. Sup. Ct. R. 16.1(a); 16.1(b).

FOR THE ATTORNEY GENERAL



DAVID K. REES, 1010
Assistant Attorney General
Office of the Attorney General

Attorneys for Plaintiff-Appellee

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: 866-3611
AG Alpha No. IA GG ADRA
AG File No. CAG8201691/JD

CERTIFICATE OF MAILING

I, David K. Rees, a member of the bar of this court, herewith certify that the within MOTION TO DISMISS has been deposited in the United States mail, first-class postage prepaid, addressed to Alexander L. Stevas, Clerk of the Court, Supreme Court of the United States, Washington, D.C., 20593 and that to my knowledge the mailing took place on July 2, 1982 within the permitted time for filing the motion.

David K Rees

STATE Colorado)
) ss.
COUNTY OF Denver)

Subscribed and sworn to before me this 2d day of July, 1982.

Mary Ellen Kuster
NOTARY PUBLIC
1525 Sherman St., 3rd Fl
ADDRESS
Denver, Colo. 80203
ADDRESS

My Commission expires:
12/5/82

AG File No. AAG8201691/C